
Accepting the Mutability of Broadcast Localism: An Analytic Position

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I. INTRODUCTION

Many scholars of broadcasting regulation describe localism as the “bedrock” or “keystone” of U.S. broadcasting.¹ Though the term “localism” is absent from any major act of broadcast legislation,² scholars refer to an array of policies that demonstrate lawmakers’ commitment to sustaining or improving upon the equal distribution of service and local programming among communities.³ Despite the lawmakers’ commitment to localism, policy analysis demonstrates that the Federal Communications Commission’s (“FCC”) treatment of the lo-

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¹ See, e.g., ROBERT L. HILLIARD & MICHAEL C. KEITH, *THE QUIETED VOICE: THE RISE AND DEMISE OF LOCALISM IN AMERICAN RADIO* 14 (2005); ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 157 (1989).

² See PHILIP NAPOLI, *FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA* 204 (2001); see also Harry Cole & Patrick Murck, *The Myth of the Localism Mandate: A Historical Survey of How the FCC’s Actions Belie the Existence of a Governmental Obligation to Provide Local Programming*, 15 *COMMLAW CONSPECTUS* 339, 340 (2007) (“[T]he concept of localism, as the FCC now expresses it, has, at best, no more than a marginal and indirect legislative basis.”).

³ See Andrew Calabrese, *Why Localism? Communication Technology and the Shifting Scales of Political Community*, in *COMMUNICATION AND COMMUNITY* 241, 253-54 (Gregory J. Shepherd & Eric W. Rothenbuhler eds., 2001); HILLIARD & KEITH, *supra* note 1, at 36; HORWITZ, *supra* note 1, at 183; NAPOLI, *supra* note 2, at 204; Sandra Braman, *The Ideal v. the Real in Media Localism: Regulatory Implications*, 12 *COMM. L. & POL’Y* 231, 232 (2007); Cole & Murck, *supra* note 2, at 341; Tom A. Collins, *The Local Service Concept in Broadcasting: An Evaluation and Recommendation for Change*, 65 *IOWA L. REV.* 553, 566 (1980); Gregory M. Prindle, Note, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 279, 290 (2004).

calism principle is wavering, ad hoc, and tentative.⁴ Public interest and media reform groups regularly alert both the public and broadcast stakeholders to inconsistencies in the FCC's regulation of localism through their activism, research, and publications. Recently, public interest groups have identified media consolidation as the primary threat to the principle of localism in broadcasting. Indeed, for over a decade, public interest groups have focused their efforts on the deregulation of ownership limits, cross ownership restrictions, and the resulting concentration of media ownership.

For example, in 2003, the Prometheus Radio Project, represented by Media Access Project, challenged the FCC's power to loosen several broadcast ownership rules.⁵ In reviewing the FCC's Order taking such action, the Third Circuit Court of Appeals affirmed the FCC's power to "regulate media ownership," but found that the order relaxed ownerships limits for local radio and television, and relaxed cross-media ownership rules, without adequate support. As such, the court partially remanded the Order, instructing the FCC to modify or provide additional justification for the amended regulation.⁶

Following this decision, public interest groups have continued to monitor the FCC's rule changes following each of its statutorily mandated periodic reviews.⁷ In *Prometheus II*, a coalition of media reform groups challenged the Commission's 2008 Order relaxing the newspaper-broadcast cross-ownership ban. Petitioners claimed that the Commission's Order would result in fewer local news stories and fewer local news sources.⁸ In response to the Commission's most recent Notice of Proposed Rulemaking on media ownership, *Prometheus II* petitioner Free Press claimed, "[r]esearch strongly suggests that, if

⁴ HORWITZ, *supra* note 1, at 155; NAPOLI, *supra* note 2, at 215-16; *see* Cole & Murck, *supra* note 2, at 351.

⁵ *See In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in Arbitron Survey Area, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620 (June 2, 2003); *see* Prometheus Radio Project v. FCC, 373 F.3d 372, 381-82 (3rd Cir. 2004) [hereinafter Prometheus I] (questioning the Commission's statutory authority to significantly relax restrictions on consolidated media).

⁶ *Prometheus I*, 373 F.3d at 382 (remanding for justification or modification, and continuing a stay for implementation of the rules pending review of the Commission's action).

⁷ *See* Prometheus Radio Project v. FCC, 652 F.3d 431 (3rd Cir. 2011) [hereinafter Prometheus II]. The FCC must periodically review its ownership rules, so such challenges may become as regular as each required review. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(h), 110 Stat. 56, 111-12 (1996).

⁸ *See Prometheus II*, 652 F.3d at 437-38 (finding that the FCC violated the Administrative Procedures Act by failing to provide ample time to comment on the newspaper-broadcast cross-ownership ("NBCO") rule and thus vacating and remanding the modified NBCO rule).

anything, relaxing the [newspaper-broadcast cross-ownership] rule would lead to fewer independent sources of local news and is more likely to decrease the amount of local news at the market level.”⁹

In recent years public interest groups have urged the Commission to adopt and enforce local programming requirements beyond the obligation to file an “issues/programs” list each quarter within the mandatory public file.¹⁰ Furthermore, Free Press released a report encouraging the FCC to vigilantly monitor quarterly localism reports filed by Comcast-NBC Universal (“CNBC-U”), detailing the production and distribution of local news and public affairs programming by NBC and Telemundo owned-and-operated stations.¹¹ In its report, Free Press explained that C-NBCU failed to satisfy the localism conditions pursuant to the terms of the Merger Order, in which the FCC approved Comcast’s acquisition of NBCU.¹² Free Press reports that C-NBCU had not produced the required additional 1,000 hours per year of locally produced news and information programming at all of its owned and operated stations.¹³ It also found that the company failed to comply with key aspects of the reporting requirements; namely C-NBCU failed to provide a “short description of [each] program” satisfying the localism commitment.¹⁴ In assessing the case, Free Press notes, “the FCC bears some blame for failing to require information that would have enabled the public to better assess whether C-NBCU stations are airing programming that is responsive to the needs of local communities.”¹⁵

It is clear from the record of reports, comments, and complaints made in recent years that the FCC has failed to satisfy the expectations of citizens, public interest groups, and academics in its handling of rules affecting the state of

⁹ *In re* 2010 Quadrennial Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services, *Comments of Free Press*, MB Docket No. 09-182, MB Docket No. 07-294, at 28 (Mar. 5, 2012) [hereinafter Free Press Quadrennial Review Comments] (accessible via FCC Electronic Comment Filing System).

¹⁰ See *In re* Broadcast Localism, *Reply Comments of Public Interest Public Airwaves Coalition*, MB Docket No. 04-233, at 14-15 (June 11, 2008) (accessible via FCC Electronic Comment Filing System); see also *In re* Broadcast Localism, *Comments of Public Interest Public Airwaves Coalition*, MB Docket No. 04-233, at 18-20 (Apr. 28, 2008) (accessible via FCC Electronic Comment Filing System).

¹¹ CORIE WRIGHT, FREE PRESS, NO NEWS IS BAD NEWS: AN ANALYSIS OF COMCAST-NBCU COMPLIANCE WITH FCC LOCALISM CONDITIONS 10 (2011), available at <http://commcns.org/YbOgMh>.

¹² See generally *In re* Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc; For Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 F.C.C.R. 4238, 4372 (Jan. 18, 2011) (Appendix A, Localism Conditions).

¹³ WRIGHT, *supra* note 11, at 4-6.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 11.

local broadcasting. Many who acknowledge this situation have not only pursued reformist activities, but also have attempted to explain it. For some, the FCC's ineffectiveness in enforcing local-programming requirements speaks to the difficult task of regulating content in a democracy. Due to First Amendment concerns, "[p]olicymakers have failed to reach a stable definition of what constitutes local programming, which has contributed to the sense of ambiguity and inconsistency that [has] long characterized localism policymaking."¹⁶ For others, an inconsistent approach to managing broadcast localism is simply indicative of a toothless agency. From a broadcaster's perspective, the fact that "the Commission raises its regulatory eyebrows and huffs and puffs about some localism obligation" is immaterial when the agency itself has been unable or unwilling to define, implement, and enforce such a policy since its earliest days.¹⁷ While the Commission may claim authority, as a regulator, it does little to effectively promote localism.

A review of analytic work on broadcast localism makes two points clear: first, scholars agree that localism is foundational to the structure of the U.S. broadcast system and, second, criticism of the FCC's protection of localism has circulated throughout rulemaking and enforcement.¹⁸ This article aims to broaden the discussion of localism policy in American broadcasting by considering the role and definitions of the localism principle.

Discussion throughout the article also encourages a different interpretation of the FCC's approach to managing the localism principle. In general, localism in U.S. policy is consistently mutable. The FCC is one of many governing bodies that must, unenviably, attempt to manage a culturally-celebrated concept that lacks a legally accepted presence. Looking at the treatment of localism in different areas of American governance, it is apparent that localism has been given various meanings and is used at different times for different purposes. By reading localism as a mutable principle—one that shifts in shape and implementation on a regular basis—the pressing question of regulatory analysis should not be, whether or not localism is being protected, but which concept of localism is being protected and under what FCC rules.

To expand on this position, this article examines what may be a resurgence of localism in the aftermath of the Telecommunication Act of 1996.¹⁹ Starting in 2000, with the creation of the Low Power FM Radio ("LPFM") license,²⁰ the

¹⁶ Philip M. Napoli, *The Localism Principle in Communication Policymaking and Policy Analysis: Ambiguity, Inconsistency, and Empirical Neglect*, 29 POL. STUD. J. 372, 373 (2001).

¹⁷ Cole & Murck, *supra* note 2, at 371.

¹⁸ *Id.* at 339-40.

¹⁹ See generally Thomas W. Hazlett, *Economic and Political Consequences of 1996 Telecommunications Act*, 50 HASTINGS L.J. 1359 (1999).

²⁰ *Low Power FM Radio*, FCC (May 17, 2011), <http://commcns.org/WiVwkg>.

Commission pursued several actions in the name of localism. In addition to LPFM, the FCC, led by Chairman Michael Powell, initiated a localism proceeding with the intent to “address behavioral rules that promote localism.”²¹ In 2008, the Commission, chaired by Kevin Martin, followed up on the LPFM inquiry by releasing a combined Report and Order and Notice of Proposed Rulemaking as part of the localism proceeding.²²

The article begins by exploring theories regarding the establishment of locally-structured systems, as well as the relationship between theories of local democratic participation and a system predicated on the local allocation of spectrum. In turn, the discussion examines the FCC’s treatment of the localism principle, with specific criticism directed toward Congress and the FCC for what can be considered their failure to meet/accomplish/achieve the democratic intentions of localism.

This article questions the definitions of localism that underlie the rules for LPFM service and the proposals of the Localism Proceeding. In order to establish the validity of this inquiry, this article details the history of localism in U.S. broadcast regulations as a vaguely defined principle. By highlighting the inherent ambiguity of broadcast localism, this article will demonstrate that when discussing codified localism, it is necessary to analyze which definition of the principle is invoked through policy, including the factors influencing the activation of a particular form. Thus, this article encourages those interested in theorizing localism’s place in American broadcasting to view the principle not simply as a regulatory standard, but more so as a provision included for its symbolic power.

II. ESTABLISHING THEORIES OF LOCAL MEDIA AND THE DEMOCRATIC ROLE OF LOCAL MEDIA

It is an American tradition to believe in the democratic power of local media.²³ Different in purpose from national media, local news sources are expected to report on the pressing issues and conditions affecting citizens in the

²¹ *In re Broadcast Localism, Notice of Inquiry*, 19 F.C.C.R. 12,425, ¶¶ 5, 7 (June 7, 2004) [hereinafter Broadcast Localism NOI] (seeking comment, specifically, “on how broadcasters are serving the interests and needs of their communities . . . whether market forces will provide enough incentive for a broadcast station to satisfy a particular policy goal, or whether regulation is needed.”).

²² *In re Broadcast Localism, Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 F.C.C.R. 1324 (Dec. 18, 2007) [hereinafter Broadcast Localism Report & NPRM]; Broadcast Localism NOI, *supra* note 21; *see also Broadcast Localism*, GARVEY SHUBERT BARER (Feb. 19, 2008), <http://commcns.org/10hu8c3>.

²³ John W. Whitehead, *Why Local Newspapers are the Basis of Democracy*, HUFFINGTON POST (Nov. 11, 2012), <http://commcns.org/XGZZ1n>.

immediate geographic community.²⁴ It follows that a thriving local press nourishes the political life of the community it serves. Locally-produced news content about local matters enables “enhanced political participation and better informed political decision making.”²⁵ For this reason, American sociologist Eric Klinenberg argues, it is crucial that media companies “stake a claim in the communities where they operate.”²⁶ Klinenberg elaborates that when this occurs:

[T]he media contribute to the vitality of local democratic politics by shedding light on important issues that private citizens do not have the time, inclination, or expertise to uncover or understand on their own. In the process, local media can provide a forum from which dissenting voices reach the public, and also help to mediate disputes between self-interested groups.²⁷

Belief in the democratic potential of circulation of local information is an American tradition that arguably derives from the ideals of Thomas Jefferson. Wary of a political system that concentrated authority within the federal government, Jefferson countered the federalist plan for democracy with his notion of a strong republic.²⁸ In his essays and letters about the ideal political system, Jefferson proposed a nation comprised of “little republics”—small counties granted the authority to rule over the social, political, and economic matters within its boundaries.²⁹ Jefferson believed that people had a natural right to self-government.³⁰ Thus, it followed that the federal government should enable communities to build and sustain themselves by granting them the legal capacity for self-determination.³¹ Localities grow in strength as educational, commercial, and legal infrastructures develop.³² Such is described in a written exchange with John Tyler in 1810, in which Jefferson explains the “two great measures” of his design for a strong republic:

[First, t]hat of general education, to enable every man to judge for himself what will

²⁴ *How People Learn About Their Local Community: The Role of Newspapers*, JOURNALISM.ORG (Sept. 26, 2011), <http://commcns.org/VrxGm>.

²⁵ Philip M. Napoli, *Access and Fundamental Principles in Communication Policy*, 2002 L. REV. MICH. ST. U. DET. C.L. 797, 801 (citing William Barlow, *Community Radio in the US: The Struggle for a Democratic Medium*, 10 MEDIA CULTURE & SOC’Y 81, 102-03 (1988)).

²⁶ ERIC KLINENBERG, *FIGHTING FOR AIR: THE BATTLE TO CONTROL AMERICA’S MEDIA* 23 (2007).

²⁷ *Id.*

²⁸ Susan Henderson-Utis, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOW. L.J. 459, 473-74 (2009).

²⁹ See Arthur J. Versluis, *The Revolutionary Conservatism of Jefferson’s Small Republics*, 48 MODERN AGE 6, 9 (2006).

³⁰ THOMAS JEFFERSON, *POLITICAL WRITINGS* 159-160 (Joyce Appleby & Terence Ball eds., 1999).

³¹ *Cf. id.* (proposing local educational and governmental structures to build “little republics [which] would be the main strength of the great one.”).

³² *See id.*

secure or endanger his freedom. [Second, t]o divide every county into hundreds, of such size that all the children of each will be in reach of a central school in it. But this division looks to many other fundamental provisions. Every hundred, besides a school, should have a justice of the peace, a constable and a captain of militia. These officers, or some others within the hundred, should be a corporation to manage all its concerns, to take care of its roads, its poor, and its police by patrols &c. (as the select men of the Eastern townships). Every hundred should elect one or two jurors to serve where requisite, and all other elections should be made in the hundreds separately, and the votes of all the hundreds be brought together. Our present Captaincies might be declared hundreds for the present, with a power to the courts to alter them occasionally. These little republics would be the main strength of the great one.³³

Focused on the human capacity for rational thought, Jefferson saw self-government as the supreme and most natural political state.³⁴ It follows that, for a decentralized government to thrive, it's citizens' inherent skill for rational thought must be nurtured by education: "Endowed by their Creator with reason and an innate moral sense, ordinary mortals—rightly educated and freed from sophistry, superstition and meddlesome government—are capable of achieving quite extraordinary things."³⁵ For Jefferson, ward republics were prime settings for the cultivation of a vigorous citizenry: youth would be educated within local schools and would learn civic participation from their elders, who would instruct them on how to contribute to the commercial and political health of the community.³⁶

In addition to Jefferson, a number of political theorists assert that citizens learn the skills of civic participation at a local level.³⁷ In Carole Pateman's analysis of John Stuart Mill's model of participatory democracy, she notes that while Mill agrees with Rousseau "about the educative function of participation," what distinguishes their theories is Mill's claim that civic education, which prepares citizens for a participatory role in national politics, exclusively takes place at the local level.³⁸ Summarizing this important claim appearing in *Considerations on Representative Government*, Pateman states:

[F]or Mill, it is at local level where the real educative effect of participation occurs, where not only do the issues dealt with directly affect the individual and his everyday life but where he also stands a good chance of, himself, being elected to serve on a local body. . . . It is by participating at the local level that the individual "learns democracy."³⁹

In this account, "participation" at the local level is constituted by the formal

³³ *Id.* at 183.

³⁴ *Id.* intro., at xxii.

³⁵ *Id.*

³⁶ See RICHARD D. BROWN, *THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA, 1650-1870*, at 75-77 (1996); DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 10 (2003).

³⁷ NAPOLI, *supra* note 2, at 206.

³⁸ CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 30-31 (1970).

³⁹ *Id.* at 31.

processes of voting and running for office in a strictly political setting,⁴⁰ though later in his work, Mill considers the significance of democratic exercises within the workplace, what Pateman describes as “the most interesting aspect of Mill’s theory.”⁴¹ She explains, “[j]ust as participation in the government of the collective interest in local politics educates the individual in social responsibility so participation in the management of the collective interest of an industrial organization [sic] fosters and develops the qualities in the individual that he needs for public activities.”⁴² Participating in workplace or union elections has the same “improving effect” as participating in local government—both are forms of civic exercises that strengthen the democratic system.

Contemporary scholars make a similar point: Community engagement nurtures the public sphere. Whether the focus is social, religious, or political, participation in any local group produces that which cultivates civic responsibility—“social capital.”⁴³ As Robert Putnam explains, the bond experienced by participants of local groups, combined with a sense of trust and reciprocity, sustains a democracy:

[I]n communities that are rich in social capital, civic norms sustain an expanded sense of ‘self-interest’ and a firmer confidence in reciprocity. Thus if our stocks of social capital diminish, more and more of us will be tempted to ‘free-ride,’ not merely by ignoring the appeals to ‘viewers like you,’ but by neglecting the myriad civic duties that allow our democracy to work.⁴⁴

Putnam reminds Americans of what they have known by practice since the early nineteenth century when voluntary associations experienced a growth spurt. Formed over shared morality or political ideals, early associations often engendered civic action.

Impressed by these collectives, French historian Alexis de Tocqueville identified associations as a distinguishing feature of American democracy. Toqueville was particularly struck by the inclination to assemble in attempts to reform the law.⁴⁵ While recognizing the risk of anarchy within systems that permit free association, he observed, “the most democratic country on earth is found to be, above all, the one where men in our day have most perfected the art of pursuing the object of their common desires in common and have applied

⁴⁰ *Id.* at 30, 32.

⁴¹ *Id.* at 33.

⁴² *Id.* at 34.

⁴³ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 348-49 (2000).

⁴⁴ *Id.*

⁴⁵ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 490 (Harvey C. Mansfield & Delba Winthrop eds. & trans. 2000) (noting that “the English execute very great things in isolation, whereas there is scarcely an undertaking so small that Americans do not unite for it.”).

this new science to the most objects.”⁴⁶

Analyzing the development of American civic life, sociologist Michael Schudson argues that voluntary associations played an instrumental role in fostering political involvement in the early nineteenth century and catalyzing the growth of nascent political parties.⁴⁷ As many voluntary associations had political objectives and “borrowed” practices and forms from political life, these organizations not only served as a model for budding political parties, but also provided individuals a way to easily bridge their interests with activities in the political realm.⁴⁸ Though the ethical quality of politics during this period was dubious and largely characterized by patronage, civic engagement was plentiful, often doubling as displays of loyalty to associations and parties.⁴⁹ Schudson argues that the civil service reforms of the Progressive era removed what, for many, was interesting about civic engagement:

In the lingering demise of patronage, the musculature of American democracy weakened, and the flesh that made the constitutional bones move in synchrony, if only in certain directions, went slack. Maybe, as the reformers said, the job-hungry parties had begun to get in the way of truly democratic government in the public interest. At the same time, weakening the parties, structurally and psychologically, may have left the public sphere not only cleansed but bleached of the color that had made people care about it.⁵⁰

According to Jefferson, Mill, Tocqueville, Putnam, and Schudson, individuals experience the power of localism through the act of association—congregating to discuss public matters and collectively plan actions.⁵¹ These interactions build trust among community members, inspire civic responsibility, shield against despotism, and foster democracy.⁵²

It is the responsibility of local media to provide the public with information

⁴⁶ *Id.*

⁴⁷ See MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 98-100 (1998).

⁴⁸ See *id.* at 100; see also TOCQUEVILLE, *supra* note 45, at 181 (outlining the three-step process by which individuals’ associations lead to political involvement: first, an intellectual bond, next, small gatherings, and, finally, forming a small but separate government inside the government).

⁴⁹ SCHUDSON, *supra* note 47, at 99-103, 131, 187 (detailing the genesis of associations, the role that their mass appeal played in bolstering loyalties to political parties, and the interestedness and the partiality from which politics suffered).

⁵⁰ *Id.* at 155.

⁵¹ See, e.g., JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 367-68 (Thomas McCarthy ed., William Rehg trans., MIT Press 1996) (1992) (discussing the collective and the collaborative nature of these organizations); SCHUDSON, *supra* note 47, at 108-09 (using the Boston Female Anti-Slavery society as an example of an association that endeavored to redefine women’s role in political discourse); TOCQUEVILLE, *supra* note 45, at 496-98 (discussing the allure of political associations).

⁵² See TOCQUEVILLE, *supra* note 45, at 485-87, 490 (discussing how “local freedoms” and the “administration of small affairs” bring citizens closer to one another, despite their proclivity towards individualism and despotism).

about local matters, enabling citizens to fulfill their desire for civic engagement. “To be self-governing,” according to Professor C. Edwin Baker, “people require the capacity to form public opinion and then to have that public opinion influence and ultimately control public ‘will formation’—that is government laws and policies.”⁵³ Locally-owned media are most successful at delivering information that furthers the public’s progression toward “will formation,”⁵⁴ since local owners “are likely to identify more often with the quality of their firm’s journalistic efforts and the paper or station’s service to their communities.”⁵⁵

II. LOCALISM AS FAIR ALLOCATION IN U.S. BROADCASTING

A. Fair Allocation

The American system of broadcast licensing and regulation affords special importance to local reporting.⁵⁶ The Radio Act of 1912 sought to constrain the number of amateur transmissions by instituting licensing requirements and wave length restrictions, thus prioritizing the creation of as many sustainable broadcast that would serve the towns and cities in which they are located.⁵⁷

The Radio Act of 1927 (“1927 Act”) ordered the Federal Radio Commission (“FRC”) to “make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States

⁵³ C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 7 (2007).

⁵⁴ Baker appropriates “will formation” from Jürgen Habermas. Compare BAKER, *supra* note 53, at 7 (equating “public ‘will formation’” to the government’s laws and policies), with HABERMAS, *supra* note 51, at 5, 38, 77, 103-04 (discussing the importance of community members’ participation in the “will-formation” process).

⁵⁵ BAKER, *supra* note 53, at 34. Even without research to support the formula, it is often assumed that locally owned media are superior at local reporting because they are believed to possess both a residential expertise and vested interest in the area and people of coverage.

⁵⁶ See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 557 (2009) (Breyer, J., dissenting) (“The FCC cannot claim that local coverage lacks special importance. To the contrary, ‘the concept of localism has been a cornerstone of broadcast regulation for decades.’” (quoting *In re Broadcast Localism, Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 F.C.C.R. 1324, ¶ 5 (Dec. 18, 2007))); see also ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–35*, at 13 (1993) (noting Secretary of Commerce Herbert Hoover’s emphasis that broadcasting regulation should be in the hands of private actors).

⁵⁷ ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES* 32 (1966); SUSAN J. DOUGLAS, *INVENTING AMERICAN BROADCASTING 1899–1922*, at 234, 236-38 (1987); see also Radio Act of 1912, Pub. L. No. 62-264, ch. 287, §§ 2–4, 37 Stat. 302, 304 (1912), *repealed by* Radio Act of 1927, Pub. L. No. 69-632, § 39, 44 Stat. 1162, 1174 (1927).

and communities as to give fair, efficient, and equitable radio service to each of the same."⁵⁸ While legislators intended the FRC to fairly allocate resources among the five zones designated by the Act, they left the specifics of distribution to the discretion of the FRC.⁵⁹ In the debate over provisions of the Act, co-author of the 1927 Act, Senator Clarence Dill of Washington stated, "[w]e did not think it wise to require that the [FRC] . . . be compelled to give every State a wave length, because there are some States so located that that might not be necessary in order to give them fair service. . . ."⁶⁰

Soon after its formation, the FRC ran into trouble as litigation arose, claiming violations of the fair allocation requirement.⁶¹ Additionally, land grant college stations appealed the FRC's allocation of power and channels, claiming interference by other stations' broadcasts, a problem that left many of the highly populated southern states with few stations.⁶² Representative Ewin Davis, a Democrat from Tennessee, responded to the educational and nonprofit stations' plight by proposing an amendment to require the FRC to equally apportion the geographic distribution of power and channels, which became known as the Davis Amendment.⁶³ Specifically, the Davis Amendment required the FRC to "make an equal allocation among the five zones, of broadcasting licenses, of wave lengths, and of station power and provides that within each zone there should be an equitable allocation among the States thereof in proportion to population and power."⁶⁴ The same year the Davis Amendment was enacted, the FRC complied with its directive by implementing a new allocation plan, General Order 40.⁶⁵ Furthering the fair allocation philosophy of the

⁵⁸ Radio Act of 1927 § 9.

⁵⁹ *Id.* § 4(d); see also 67 CONG. REC. 12,618 (1926) (discussing the purpose behind the 1927 Act's enabling the FRC to exercise discretion, when allocating wavelength) (colloquy between Sens. Willis and Dill).

⁶⁰ 67 CONG. REC. 12,618 (1926) (statement of Sen. Clarence Dill).

⁶¹ See, e.g., *United States v. Zenith Radio Corp.*, 12 F.2d 614, 617-18 (N.D. Ill. 1926) (affirming a challenge to the FRC's regulations, concluding that the FRC exceeded the scope of the 1912 Act by imposing time and wavelength restrictions on certain broadcasters); *Hoover v. Intercity Radio Co.*, 286 F. 1003, 1007 (D.C. Cir. 1923) (holding that the Secretary of Commerce lacked the discretion to deny frequency licenses); see also JESSE WALKER, *REBELS ON THE AIR: AN ALTERNATIVE HISTORY OF RADIO IN AMERICA* 32-33 (2001).

⁶² GEORGE H. GIBSON, *PUBLIC BROADCASTING: THE ROLE OF THE FEDERAL GOVERNMENT, 1912-76*, at 10 (1977).

⁶³ *Id.*

⁶⁴ 69 CONG. REC. 3835 (1928) (statement of Rep. Ewin L. Davis).

⁶⁵ Contemporary broadcast historians consider General Order 40 an impediment to localism through the establishment of forty "clear channel" stations. See MCCHESENEY, *supra* note 56, at 25-26 (arguing that the "clear channel" policy favored the massive broadcasting corporations at the expense of the smaller broadcasters); HUGH R. SLOTTEN, *RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES, 1920-1960* 47, 51, 53-54 (2000) (noting critics' claims that the FRC was biased against noncommercial

Davis Amendment, the Communications Act of 1934 mandates that the FCC “make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”⁶⁶

B. Theory One: Fair Allocation, A Result of Amateurs

The United States’ locally-oriented, noninterference, private-rights licensing model stands in stark contrast to the centralized European system, where most broadcasters are licensed to serve the national community.⁶⁷ In the first volume of his history of American broadcasting, Erik Barnouw suggests that America’s unique system descends from the informal structure of the pre-regulated era, which was made up of amateur operating stations in localities throughout the country.⁶⁸ Before the establishment of the Radio Act of 1912, numerous tinkerers who were driven by personal interest built and operated radio sets, freely sending Morse Code signals and, in some cases, music.⁶⁹ The 1912 Act introduced to the system new mechanisms for maintaining order, as it required licensing for all radio operators and confined amateur operators to less desirable short waves of less than two hundred meters.⁷⁰ However, the influence of these so-called amateur tinkerers was not lost; radio hobbyists continued to operate, either on prime wavelengths without a license or legally on a licensed assignment.⁷¹

In the early-twentieth-century, many radio hobbyists practiced early forms of broadcasting by producing programs consisting of speech and music intended for unknown listeners.⁷² In January 1921, however, amateur broadcast-

educational broadcasters).

⁶⁶ 47 U.S.C. § 307(b) (2006).

⁶⁷ Compare Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 139, 143, 147, 167, 170 (1990) (noting the American broadcasting system’s emphasis on a distributive private-rights approach to radio broadcasting regulation), with Russell B. Barber, *The European Broadcasting Union*, 6 J. BROADCASTING 111, 111-13 (1962) (the purpose of the European broadcasting regulatory authority is to “obtain ‘unification and consolidation of broadcasting in Western Europe as a whole’”), and Thomas J. Cryan et al., *Radio for the 1990s: Legal Strategies in an Emerging Global Marketplace*, 22 U. MIAMI INTER-AM. L. REV. 377, 391 (1991) (“Long governed by Europe’s noncommercial state-run services, the [European regulatory authority] must now cope with the extraordinary demands of privatization.”).

⁶⁸ See BARNOUW, *supra* note 57, at 33.

⁶⁹ See e.g., *id.* at 29-30, 34; DOUGLAS, *supra* note 57, at 198, 204; WALKER, *supra* note 61, at 25.

⁷⁰ CLINTON B. DESOTO, TWO HUNDRED METERS AND DOWN: THE STORY OF AMATEUR RADIO 31, 95 (1936).

⁷¹ DOUGLAS, *supra* note 57, at 234, 236.

⁷² See BARNOUW, *supra* note 57, at 27, 30, 34 (anecdotally describing the first forms of radio broadcasting).

ing was severely curtailed by the Commerce Department, which forbid licensed amateurs from broadcasting “weather reports, market reports, music, concerts, speeches, news, or similar information or entertainments.”⁷³ To adapt, many who were hobbyists during the early twentieth century started affiliating with nonprofit organizations or companies that manufactured or sold radio equipment.⁷⁴ Although a blow to amateur operations, radio of the early 1920s sustained the experimental character of the first amateurs:

Opera here, country there, a lot of potted palm music and a little bit of jazz, even a weekly on-air meeting of a make-believe Keep Growing Wiser Order of Hoot Owls: early programming was energetic and diverse. The Hoot Owls, merry Masons of Portland, Oregon, sounded “as though there was a dandy party going on in the next room and somebody had left the door open,” reported *The Wireless Age*. “The degree team is made up of the best wits in town, one merchant, one lawyer, a wholesaler, a piano dealer, the owner and manager of a booking service and an insurance man; also the manager of KGW and a goat that is always heard but never seen.”⁷⁵

Though radio lost much of this local flavor once the FRC licensed the bulk of the broadcast spectrum to the networks, the Radio Act of 1927 preserved the organically developed structure of amateur broadcasting activity by enacting an allocation scheme that distributes licenses among communities.⁷⁶

C. Theory Two: Fair Allocation, A Result of Democratic Theory

Some scholars pose a different explanation for the U.S. system of local licensing. These scholars argue that, similar to the way that the Constitution’s postal provision was established in part to cultivate a local press, Congress’ fair allocation mandate was an attempt to establish local broadcasting for democratic ends.⁷⁷ The “great, even undue, influence” exerted by electronic media is “diluted” by distributing broadcast power, through licensing, to many diverse parties.⁷⁸ Done to supplement a decentralized political system, this ar-

⁷³ WALKER, *supra* note 61, at 10.

⁷⁴ BARNOUW, *supra* note 57, at 28; see CHRISTOPHER STERLING & JOHN MICHAEL KITROSS, *STAY TUNED: A HISTORY OF AMERICAN BROADCASTING* 45 (3d ed. 2002) (discussing the radio experimenter, Charles D. “Doc” Herrold, and the career paths available to him and others in the radio broadcasting field); see also WALKER, *supra* note 61, at 30 (stating that amateurs, who failed to expand “their operations into commercial outlets,” were effectively barred from broadcasting).

⁷⁵ WALKER, *supra* note 61, at 30 (quoting *Hot Hoot Owl Stuff*, *WIRELESS AGE*, May 1924, at 40).

⁷⁶ The Act empowers the FCC to distribute “licenses, frequencies, hours of operation” across communities so long as the distribution is “fair, efficient, and equitable.” 47 U.S.C. § 307(b) (2006).

⁷⁷ See, e.g., Braman, *supra* note 3, at 236-37 (discussing how the Constitution’s postal provisions promoted political discourse); see also HILLIARD & KEITH, *supra* note 1, at 35; HORWITZ, *supra* note 1, at 157-58; NAPOLI, *supra* note 2, at 205-07; Calabrese, *supra* note 3, at 251; Collins, *supra* note 3, at 570.

⁷⁸ Collins, *supra* note 3, at 570.

rangement ultimately results in strengthening the position of localities.⁷⁹ Thus, Congress instituted, and the FCC oversaw, “a vague, progressive, almost Jeffersonian vision of a democratically communicating local community,” bestowing local organizations with the legal capacity to broadcast because of a belief in their ability to speak to and for their communities.⁸⁰

D. Theory Three: Fair Allocation, A Result of Regulatory Rhetoric

This view is by far the most popular explanation for the local structure of U.S. broadcasting. However, one scholar takes issue with the claim that the localism doctrine must be attributed to policymakers’ regard for Jeffersonian democracy: “there is in fact almost no evidence that policymakers were harboring nostalgic fantasies about small town life....”⁸¹ In his dissertation explaining the regulators’ intentions behind sustaining broadcast localism, Bill Kirkpatrick traces discourse within popular, trade, and government texts from 1920-1934, which reveals a cultural, class-based struggle over the modernization of the nation.⁸² During the early twentieth century, when the world first began to make sense of radio, the U.S. middle class was in the midst of a bifurcation along economic and cultural lines. This resulted in the formation of an urban, technocratic national class—with sights set on the development of a national, corporate-industrial economy—and a rural, agrarian middle class.⁸³ Kirkpatrick demonstrates that localism held “different valences and uses” for each class.⁸⁴

While the national class celebrated what Kirkpatrick calls a “positive localism”—the Progressive ideal of community improvement through social and civic engagement—they criticized the “negative localism” found in rural areas—a provincial attitude that resisted changes of modernization and urban culture.⁸⁵ The national class opposed “what it perceived as pre-modern resistance to its nationalizing project,” reserving its “most pronounced hostility . . . for the local middle class that populated the small towns and countryside throughout the nation.”⁸⁶ Regulators of the 1920s conceived of radio as part of a nationalizing project “with the purpose of integrating the pre-modern local

⁷⁹ *Id.*

⁸⁰ HORWITZ, *supra* note 1, at 186.

⁸¹ Bill Kirkpatrick, *Localism in American Media, 1920-1934*, at 9 (2006) (unpublished Ph.D dissertation, University of Wisconsin-Madison) (on file with *CommLaw Conspectus*), available at <http://commcns.org/V8o5Se>.

⁸² *See id.* at 4.

⁸³ *See id.* at 82.

⁸⁴ *Id.* at 13.

⁸⁵ *Id.* at 115.

⁸⁶ *Id.* at 96.

into their vision of the modern American nation.”⁸⁷ Kirkpatrick argues that Hoover, along with his selected fellow Federal Radio Commissioners, instituted a national radio system, which included a local element that was “a situational response to political pressures, class divisions, economic ambitions, and the inherited structures of radio.”⁸⁸ By the late 1920s, the FRC allocated most of the spectrum and broadcast power to the national networks, which it believed to be superior in technical capacity and programming.⁸⁹ As an indication of its political opposition to monopoly, the Commission reserved some space for outlets of local character, but it effectively marginalized independent stations by designating substantially less power to them.⁹⁰ Regulators were firmly set on “stitching the local into the modern,” which they primarily achieved by

[D]iscouraging local idiosyncrasies and subcultures while encouraging a narrow range of acceptable programming through acts of both commission and omission in the licensing process; enforcing corporate norms of financial and administrative practice that privileged modern capitalism at the expense of traditional forms of economic exchange rooted in informal social networks.⁹¹

Instead of a foundational characteristic of the system, Kirkpatrick demonstrates that localism was rhetoric appropriated by regulators and corporations to justify the construction of a national broadcast system.⁹²

III. LOCALISM AS RULES GOVERNING LICENSEE BEHAVIOR

A. Efforts to Protect Local Programming Before Deregulation

It is worth considering localism as having more of a symbolic than infrastructural presence in the U.S. system. Despite intentions for locally-owned and operated broadcast stations, due to its commercialism and networks, the U.S. system has always been a challenging setting for localism.⁹³ Because a commercial system requires broadcasters to find their own funding and operate within the parameters of regulatory and marketplace standards,⁹⁴ licensed

⁸⁷ *Id.* at 103.

⁸⁸ *Id.* at 192.

⁸⁹ *Id.* at 198.

⁹⁰ *Id.* at 181-82.

⁹¹ *Id.* at 197.

⁹² *Id.* at 182.

⁹³ Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 208 (1982) (noting that “[b]roadcasting in the United States conforms little to the model contemplated in the Commission’s licensing philosophy.”).

⁹⁴ In its review of the FCC’s decision in *FCC v. Sanders Bros. Radio Station*, the Supreme Court held that, “in short, the broadcasting field is open to anyone . . . if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.” *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

broadcasters regularly face scarce technical and financial resources. Spectrum scarcity is one well-known challenge in broadcasting, but scarce advertising dollars are just as difficult to manage, and may be the more pressing of the two.⁹⁵ A strategy for dealing with high operation costs and scarce sponsorships is network affiliation, at one time commonly known as “chain broadcasting.”⁹⁶ By permitting chain broadcasting, the FCC allowed stations to access advertising money otherwise unavailable, while simultaneously guaranteeing the dominance of the networks:⁹⁷

Because there are economies of scale that extend across programs, networks—which offered an extensive array of pre-packaged programs—made economic sense. By affiliating with a network, a local radio licensee could gain access to nationally popular figures and entertainers whom it had little chance to attract to its studio. By affiliating, an individual station alleviated much of the need to produce expensive programming or to seek out and strike individually fashioned contracts with program suppliers. Network affiliation relieved the local station from some of the burden of attracting advertisers, since the network centralized this task.⁹⁸

Despite being good for business, network affiliate contracts impede the autonomy of local stations by limiting the hours of local programming that affiliates can air. In 1941, the FCC sought to curb network control over local affiliates by issuing the *Report on Chain Broadcasting*, which was accompanied by a set of rules that ordered specific changes to network-affiliate contracts.⁹⁹ The Report concluded that awarding local affiliates greater programming autonomy would better position them “to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.”¹⁰⁰ Several years later, the FCC issued its first major policy

⁹⁵ See Fowler & Brenner, *supra* note 93, at 221-23.

⁹⁶ The FCC issued its Chain Broadcasting Rules on May 2, 1941 in part to restrict the expanding authority of the networks. See Comment, *The Impact of the FCC's Chain Broadcasting Rules*, 60 YALE L. J. 78, 78 & n.1 (1951); see also discussion *infra* note 97; see generally Report on Chain Broadcasting, *Report and Order*, Comm'n Order No. 37, Docket No. 5060 (May 1941), *aff'd*, Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

⁹⁷ Broadcast historians suggest that the development of chain broadcasting enabled the survival of locally owned stations. By the late 1920s, smaller, regional and local broadcasters were searching for a way to stay alive in an expensive business during a tough economic period. By joining networks, stations eased the burden of rising operational costs due to the FRC's increased transmission power standards for local stations and American Society of Composers, Authors, and Publishers (“ASCAP”) royalties, as well as the listening public's higher expectations for programs. As affiliates, stations were supplied programming and income from their role as part of a national advertising scheme. See MICHELE HILMES, RADIO VOICES: AMERICAN BROADCASTING, 1922-1952, at 72-73 (1997); SUSAN SMULYAN, SELLING RADIO: THE COMMERCIALIZATION OF AMERICAN BROADCASTING 1920-1934, at 40-41 (1994).

⁹⁸ HORWITZ, *supra* note 1, at 157.

⁹⁹ See Comment, *supra* note 96, 78-79.

¹⁰⁰ Report on Chain Broadcasting, *Report and Order*, Comm'n Order No. 37, Docket

statement on programming, *Public Service Responsibility of Broadcast Licensees* (“the Blue Book”), which complained that broadcasters had “shirked their responsibilities as local outlets by the extensive use of network programs, transcriptions (recorded music), and wire programs.”¹⁰¹ Concerned that some stations had become “mere common carriers of program material piped in from outside the community,”¹⁰² the Blue Book further delineated a set of goals for broadcasters to increase the airing of “local live” and public affairs programs and to reduce advertising excess.¹⁰³ The FCC enforced some of these guidelines with the enactment of the Fairness Doctrine in 1949,¹⁰⁴ which made license renewal contingent on a broadcaster’s success in meeting two programming criteria: (1) coverage of controversial issues of interest to the community of license, and (2) dedicating airtime to the presentation of opposing viewpoints on controversial issues.¹⁰⁵

The FCC unequivocally refuses to regulate programming, with the exception of indecent and obscene speech and content targeting children.¹⁰⁶ Yet, as demonstrated by the *Report on Chain Broadcasting* and the Blue Book, the Commission has periodically attempted to encourage the production of local programming by establishing rules concerning communication between broadcasters and their communities of license. For example, the FCC initiated the “main studio” rule in 1939, requiring broadcasters to maintain a primary studio in its “community of license.”¹⁰⁷ In hopes of further encouraging public participation in programming decisions, the “point of origin” rule, adopted in 1950, required broadcasters to produce a majority of their non-network programming within the community where its main studio was located.¹⁰⁸ In 1960, as part of

No. 5060, at 65 (May 1941), *aff’d*, Nat’l Broad. Co. v. United States, 319 U.S. 190 (1943).

¹⁰¹ HORWITZ, *supra* note 1, at 161.

¹⁰² FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 39 (1946).

¹⁰³ *Id.* at 55.

¹⁰⁴ *Context of 1949: FCC Enact Fairness Doctrine*, HISTORY COMMONS, <http://commons.org/SQIfmJ> (last visited Nov. 10, 2012).

¹⁰⁵ 47 C.F.R. 73.1910 (1979).

¹⁰⁶ See, e.g., *In re Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations*, *Memorandum Opinion and Order*, 60 F.C.C.2d 858, ¶ 21 (July 28, 1976) (concluding that regulation of program formats was not required by the Communications Act, nor would it benefit the public, but instead, chill innovation and burden the Commission). More recently, in a letter explaining its decision to grant a particular assignment application, the Commission emphasized that objections over format change are irrelevant because “it is well-settled policy that the Commission does not scrutinize or regulate programming.” Letter from Peter H. Doyle, Media Bureau, FCC, to Counsel for WKCP(FM), Miami, FL 8 (Mar. 12, 2008) (on file with *CommLaw Conspectus*), available at <http://commons.org/WiTVLd>.

¹⁰⁷ FCC, Rules Governing Standard Broadcast Stations, 4 Fed. Reg. 2699, 2715-16 (1939) (codified at 47 C.F.R. §§ 3.12, 3.30-.31 (1939) (repealed)).

¹⁰⁸ *In re Promulgation of Rules and Regulations Concerning the Origination Point of Programs of Standard and FM Broadcast Stations*, *Report and Order*, 43 F.C.C. 570, 570

a study of network broadcast, the Commission sought to clarify the public interest standard by issuing guidelines for community-responsive programming.¹⁰⁹ The Commission's *En Banc Programming Inquiry* set out fourteen "major elements" it deemed "necessary to the public interest," including "opportunity for local self-expression" and "the development and use of local talent."¹¹⁰ In 1966, the FCC ruled that broadcasters must maintain programming logs in order to keep the public informed of their efforts at local programming.¹¹¹ Established in 1971, the "community ascertainment" rule required applicants of broadcast licenses and broadcasters seeking license renewal to research the programming needs of the communities they sought to serve and issue a formal report of activities to the FCC.¹¹² These rules are evidence of the regulatory support of local content granted by the FCC.

B. Approach to Local Programming in a Deregulatory Era

Despite its apparent early concern for local programming, the Commission has since changed course and eliminated many of the rules promulgated to foster the production of community-responsive programming.¹¹³ These decisions are part of a lengthy period of deregulation. Rule changes affecting local content started in the 1980s with the elimination of the "point of origin" and "community ascertainment" rules based on the rationale that marketplace demand is an adequate incentive for stations to produce locally oriented programming.¹¹⁴ Beyond programming rules, the deregulatory era also introduced

(1950).

¹⁰⁹ See Report and Statement of Policy Res: Commission *en banc* Programming Inquiry, *Public Notice*, 44 F.C.C. 2303, 2303-04 (July 29, 1960).

¹¹⁰ *Id.* at 2314. Also included in the nonexclusive public interest list were: programs for children, religious programs, educational programs, public affairs programs, editorialization by licensees, political broadcasts, agricultural programs, news programs, weather and market reports, sports programs, service to minority groups, and entertainment programs. *Id.*

¹¹¹ 47 C.F.R. §§ 73.111-.112 (1966).

¹¹² *In re* Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV-A and IV-B of FCC Forms, *Report and Order*, 27 F.C.C.2d 650, ¶¶ 14, 17, App. B (Feb. 18, 1971) (providing a revised FCC Primer in Appendix B, specifically Questions 23 and 24).

¹¹³ David M. Silverman & David N. Tobenkin, *The FCC's Main Studio Rule: Achieving Little for Localism at a Great Cost to Broadcasters*, 53 FED. COMM. L.J. 469, 477 & n.45 (2001).

¹¹⁴ *In re* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Report and Order*, 98 F.C.C.2d 1076, ¶ 2 (June 27, 1984). The Commission continues to enforce a relaxed version of the main studio rule. See 47 C.F.R. § 73.1125 (2011). While a station still is required to keep part of its infrastructure located within the area it is licensed to serve, the required proximity to the community has changed from "within their principal community signal contours" to within "the principal community contour of any station in any service

the relaxation of broadcast station ownership caps. In 1984, the FCC, led by Mark Fowler, altered the well-known "7-7-7" national multiple ownership limitation rule (i.e., a national company could not own more than seven AM stations, seven FM stations, and seven VHF stations) from seven to twelve.¹¹⁵ As part of the change, the FCC introduced a national audience reach restriction of twenty-five percent.¹¹⁶ Following Fowler's departure from the FCC, deregulation of ownership limits continued, revealing that a policy of deregulation was firmly in place at the agency.¹¹⁷ In 1992, the Commission raised national ownership limits for AM and FM stations to eighteen and ordered the move to twenty stations in 1994.¹¹⁸

With the passage of further acts of regulatory and statutory deregulation, consolidation has become more prevalent.¹¹⁹ Likewise, according to media reformers and many industry professionals, the state of local ownership in broadcasting has become increasingly dire. Greatly contributing to this situation are rule changes tied to the Telecommunications Act of 1996. Congress eliminated national ownership caps for AM and FM stations, and relaxed ownership restrictions in local markets, setting limits according to the size of the market.¹²⁰ As for the ownership of television broadcast stations, Congress

licensed to the community of license" or twenty-five miles from the center of the community. Silverman & Tobenkin, *supra* note 113, at 490-91. Also, whereas the older version of the Rule required a station to originate programs at its main studio, the current version requires that a station's main studio "be capable of originating and transmitting programming." *Id.* at 486.

¹¹⁵ See *In re* Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Report and Order*, 100 F.C.C.2d 17, ¶¶ 108-110 (July 26, 1984).

¹¹⁶ *Id.*; Stuart Minor Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting is Good for the Country*, 46 WM. & MARY L. REV. 439, 446 (2004).

¹¹⁷ See Rachel M. Stilwell, *Which Public? Whose Interest? How the FCC's Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape from the Swamp*, 26 LOY. L.A. ENT. L. REV. 369, 370-371 (2006).

¹¹⁸ *In re* Revision of Radio Rules and Policies, *Report and Order*, 7 F.C.C.R. 2755, ¶ 12 (Mar. 12, 1992) (originally raising the national ownership limit to 30 FM and 30 AM stations); *In re* Revision of Radio Rules and Policies, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 F.C.C.R. 6387, ¶¶ 13-14 (Aug. 5, 1992) (amending the national ownership rule to permit a single entity to own or have an attributable interest in only 18 AM and 18 FM stations, and after two years, increasing that limit to 20 AM and 20 FM stations).

¹¹⁹ Stilwell, *supra* note 117, at 371.

¹²⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(b)(1), 110 Stat. 56, 110 (1996) ("(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate,

eliminated numerical limits pertaining to the national market, and raised the audience reach limitation to thirty-five percent.¹²¹ Although it did not specify changes to ownership limits in local markets, it ordered the FCC to conduct rule-making proceedings to determine how the duopoly rules should be modified.¹²² With regard to cross-ownership, Congress relaxed the one-to-a-market rule by waiving it for owners in the top fifty markets, and also allowed for an entity to own both a broadcast network and cable system.¹²³ In general, the Telecommunications Act allowed media companies to expand and engage in cross-platform competition. A number of scholars and citizens groups perceive the Telecommunications Act as a display of government's disloyalty to localism. In support of this claim, they point to statistics showing the decline of locally owned and produced broadcast and print media following its enactment, as well as anecdotal evidence indicating that having fewer local media sources harms the quality of information that citizens encounter in the public sphere.¹²⁴

III. REASONS FOR AMBIGUITY IN FCC LOCALISM REGULATION

A. "Informal Mode of Rulemaking"

The preceding discussion shows that the FCC's approach to managing localism is ambivalent and inconsistent. One explanation for such treatment is that ambiguity is inherent in the nature of government regulation. In other words, an ambivalent approach to managing localism does not reflect the strength of the principle, but rather it is typical behavior of a government agency. Horwitz explains that agencies practice an "*informal* mode of rulemaking" in which commissioners weigh the positions of interested parties on matters in their jurisdiction, hearing from stakeholders—largely industry—and experts, and arrive at rules to address the situation.¹²⁵ Noting that the authority of agencies is

or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the market."); Silverman & Tobenkin, *supra* note 113, at 489 (noting that "the Telecommunications Act of 1996 led to a significant easing of the ownership limitations on radio and television stations, allowing ownership of as many as eight radio stations within a single market.").

¹²¹ Telecommunications Act of 1996 § 202(c).

¹²² *Id.* § 202(c)(2).

¹²³ *Id.* § 202(d)-(e).

¹²⁴ See NAPOLI, *supra* note 2, at 222-24; WRIGHT, *supra* note 11, at 2; Todd Chambers, *Radio Programming Diversity in the Era of Consolidation*, 10 J. RADIO STUD. 33, 35 (2003).

¹²⁵ HORWITZ, *supra* note 1, at 48.

"discretionary," Horwitz states, "the agency bargains with the principal contending parties."¹²⁶ The open-ended and vague, often contradictory mandate Congress gives to the agency in its enabling legislation tends to exacerbate this dynamic of discretionary bargaining over specific policies. Consequently, few clear or steadfast policies are formulated or followed."¹²⁷ The FCC, as an agency of the New Deal era, was introduced to control entry into broadcasting and price-and-entry into telecommunications before an era of deregulation.¹²⁸ Horwitz argues the FCC applied distinct approaches to managing licensee behavior and spectrum allocation:

[T]he Commission *never* formulated clear-cut policies or rules with regard to licensee behavior, the awarding of broadcast licenses, or network-affiliate relations (including station ownership limits). Conversely, where the FCC did enact formal rules—in spectrum allocation—the Commission stuck steadfastly to a fundamentally flawed and inadequate plan. The history of FCC regulatory activity in the area of broadcasting illuminates the two basic, dialectically interrelated problems of regulation: bargaining in *ad hoc* adjudication proceedings and inflexibility of formal rule making.¹²⁹

In an effort to fulfill its mandate to protect the vaguely-defined "public interest," the FCC firmly maintained the preexisting structure of fair allocation that accommodated the networks, while simultaneously limiting its rulemaking so as not to get in the way of licensees serving their local communities.¹³⁰ Though *ad hoc* adjudication resulted in contradictory methods to managing use of broadcast spectrum, Horwitz's point is that seemingly contrary pursuits are neither atypical of, nor harmful to, the FCC. Rather they are characteristic of the behavior of government agencies. Affected by budgetary decisions and subject to congressional control, the FCC must balance the frequently competing interests of industry and the public, all the while answering to the White House and Congress. The resulting political pressure and its shifting interests have both contributed to the FCC's inconsistent policy direction.¹³¹ Additionally, the regular turnover of commissioners at the FCC exacerbates the already unpredictable environment of decision making.¹³² These unstable and varying institutional conditions provide one explanation for the FCC's varying treat-

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 70, 72.

¹²⁹ *Id.* at 155.

¹³⁰ Ultimately, Horwitz argues, such "paradoxical" activity ended up stunting the development of FM radio, broadcast television, and cable, and led to an inefficient use of the spectrum, inspiring calls for deregulation from groups across the political broad, including leftist public interest groups and conservative, capitalist economists. *See generally* HORWITZ, *supra* note 1.

¹³¹ ERWIN G. KRASNOW, LAWRENCE D. LONGLEY & HERBERT A. TERRY, *THE POLITICS OF BROADCAST REGULATION* 41-42 (3d ed. 1982).

¹³² *See id.* (explaining that, although often criticized as though it were a static institution, the Commission has to accommodate its different leaders at different times, each "with divergent opinions as to how broadcasting should be regulated").

ment of local programming.

B. Capture Theory

A slightly different way to explain the FCC's inconsistent approach to regulating localism is to examine the Commission's role within a commercial broadcast system. More than a few critics doubt the FCC's ability to regulate in the public interest, claiming the FCC's role is "captured" by industry.¹³³ The vulnerability of FCC commissioners bending to industry's will is explained by some as merely ideological, but more often, critics attribute signs of capture to material enticements, such as future "high-paying jobs in the companies they once regulated."¹³⁴

C. Localism is Inherently Uncertain in the U.S. Political System

A third approach to interpreting the FCC's ad hoc management of localism is to examine the nature of localism as a principle itself. There is an innate characteristic to localism's character that lends itself to uncertainty.¹³⁵ Beyond communications law, a survey of localism in American governance exposes this legal principle's unstable presence. Localism, meaning the self-government of U.S. localities, is not explicitly provided for by federal or state constitutions.¹³⁶ Over time, however, localism as a value has become "deeply embedded in the American legal and political culture."¹³⁷ As a matter of law, local governments are "solely creatures of state government," existing "only at the sufferance of state authority."¹³⁸ Despite their subordinate status, states

¹³³ See HORWITZ, *supra* note 1, at 29 ("[A] captured agency *systematically* favors the private interests of regulated parties and *systematically* ignores the public interest."). But see KRASNOW, LONGLEY & TERRY, *supra* note 133, at 49 ("To some critics the Federal Communications Commission seems 'captured' by the broadcast industry. While there may have been times when that assertion was true, it now seems to be off target.").

¹³⁴ KRASNOW, LONGLEY & TERRY, *supra* note 133, at 50-51 (explaining the "revolving door" relationship between the FCC and those entities subject to its regulation. For instance, "of sixteen FCC Commissioners who left the agency between 1961 and 1975, four accepted subsequent employment in regulated industries.").

¹³⁵ Richard Briffault, *Our Localism: Part I - The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 6-7 (1990) (discussing the theory that local government have limited legal powers).

¹³⁶ *Id.* at 7 (defining "localism" in terms of "local power" and "local self-determination"). The author acknowledges Philip Napoli's annotated bibliography on localism as directing her attention to Briffault's article. See PHILIP M. NAPOLI, THE LOCALISM PRINCIPLE IN COMMUNICATIONS POLICYMAKING: AN ANNOTATED BIBLIOGRAPHY (Aug. 2004), available at <http://commcns.org/UxhnoM>.

¹³⁷ Briffault, *supra* note 135, at 1.

¹³⁸ Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 632 (2001).

have granted local governments autonomy over public services within their boundaries, including those of safety, education, and property.¹³⁹ "Localism" is thus the power of local governments to exercise authority over such matters through regulation and funding through local taxes, and to protect that local system from state displacement.¹⁴⁰ As one scholar points out, localities are frequently given these responsibilities without the accompanying legal authority to raise the revenues necessary to fund these endeavors."¹⁴¹ States can expect to win legal challenges to local authority in cases where they have not granted local governments the authority to autonomously institute municipal law.¹⁴² Additionally, all local governments are subject to the doctrine of implied preemption, under which state statutes are held to preempt local laws "where there are suitable practical reasons to maintain comprehensive state regulation."¹⁴³ In these cases, issues concerning whether and to what extent local laws are impliedly preempted by state laws are determined by a judicially created set of standards.¹⁴⁴ Therefore, implied preemption "does not give one confidence that local interests will be suitably protected."¹⁴⁵ Ultimately, localism, as a formal power, is provisional.

Although it is primarily a matter of state permission and judicial discretion, localism also refers to the acts of citizens exercising their civic rights by mechanisms of "direct democracy."¹⁴⁶ Through methods of lawmaking—initiative, popular referendum, and recall—citizens participate directly in the process by voting on ballot measures.¹⁴⁷ The practice of direct democracy is not a modern concept. Colonists practiced an early version of the initiative in New England town meetings by "plac[ing] proposed ordinances or other questions on the agenda by petition, meet[ing] and discuss[ing] the proposals, and then vot[ing] to accept or reject them."¹⁴⁸ During the American Revolution, a num-

¹³⁹ Briffault, *supra* note 135, at 19 & n.59 (citing ROBERT L. LINEBERRY, *EQUALITY AND URBAN POLICY: THE DISTRIBUTION OF MUNICIPAL PUBLIC SERVICES* 10 (1977)).

¹⁴⁰ See Briffault, *supra* note 135, at 19.

¹⁴¹ Rodriguez, *supra* note 138, at 638.

¹⁴² *Id.* at 638 (citing Sho Sato, *Municipal Affairs in California*, 60 CAL. L. REV. 1055 (1972)).

¹⁴³ *Id.* at 639.

¹⁴⁴ *Id.* at 639-640.

¹⁴⁵ *Id.* at 640.

¹⁴⁶ Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 J. POL'Y HIST. 349, 374 n.2 (2002).

¹⁴⁷ *Id.* ("With the initiative, citizens collect a specified number of valid signatures in order to place either a statutory measure or a constitutional amendment on the ballot for fellow voters to adopt or reject. With the popular referendum, citizens petition their legislatures to place a disputed legislative action on the ballot for the voters to reconsider. The recall enables citizens to collect signatures to force a retention vote of an elected official.").

¹⁴⁸ DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 4 (1989).

ber of states institutionalized the idea of voter ratification of state constitutions, thereby providing a similar mechanism for citizen lawmaking.¹⁴⁹ During the Progressive Era, there was widespread interest in operationalizing devices of direct democracy at a municipal level as part of the effort to both eradicate corruption of state and city governments and ameliorate the accountability of local political officials. As Earnest Griffith explains, "Progressivism set out to reform the cities and make them honest, responsive, efficient, and humane."¹⁵⁰ Furthermore, Griffith states, "[t]here was substantial consensus among these early reformers that cities should be autonomous with regard to their charters and powers."¹⁵¹

By the late nineteenth century, industrialism, and the resulting rapid growth of urban populations, had concentrated wealth and voter power within cities.¹⁵² Citizens regularly faced the disappointment of state authority, especially where the state failed to provide cities with requested legislation.¹⁵³ At times, state legislators pursued unsolicited intervention in local affairs to gain voter and corporate support.¹⁵⁴ There was also corruption among city officials, who unscrupulously profited from the awarding of contracts for public utilities and other services.¹⁵⁵ To rectify the inefficiency of state intervention and the corruption of city officials, progressive state legislators used their power to promote municipal reform through a number of devices. One such device was the introduction of Initiative and Referendum ("I&R") to state constitutions by amendment or by state law allowing cities to adopt I&R in their charters.¹⁵⁶ Another mechanism used to reform municipalities was "home rule," where states granted cities the right to institute municipal law without subjection to state approval.¹⁵⁷ Richard Briffault describes two home rule provisions:

The original form of home rule amendment treated the home rule municipality as an *imperium in imperio*, a state within a state, possessed of the full police power with re-

¹⁴⁹ *Id.*

¹⁵⁰ ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE PROGRESSIVE YEARS AND THEIR AFTERMATH, 1900-1920, at 34 (1974).

¹⁵¹ *Id.*

¹⁵² See CHARLES N. GLAAB & A. THEODORE BROWN, A HISTORY OF URBAN AMERICA 133-34 (1967).

¹⁵³ See *id.* at 187; Wallace S. Sayre & Nelson W. Polsby, *American Political Science and the Study of Urbanization*, in THE STUDY OF URBANIZATION 115, 123-24 (Philip M. Hauser & Leo F. Schnore eds., 1965) (discussing municipal reform efforts of the 1890s which sought "home rule" for city governments and to "restrict the powers of state legislatures to enact special legislation affecting cities").

¹⁵⁴ Cf. Briffault, *supra* note 135, at 13 ("Special laws were usually drafted by local interests, handled at the state level by legislators from the locality affected and enacted by the legislature unamended.").

¹⁵⁵ DAVID BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 55-56 (2003).

¹⁵⁶ See SCHMIDT, *supra* note 148, at 5-10.

¹⁵⁷ BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

spect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference. When courts encountered difficulties distinguishing "municipal affairs" from matters of state concern, a second model was developed that sought simply to broaden local lawmaking authority without attempting to erect a wall against state laws on local matters.¹⁵⁸

Progressives presumed that there would be several benefits to states granting local citizens further autonomy over their cities. In addition to heightening the capacity of citizens to hold political representatives accountable, it was believed that the greater sense of responsibility placed on local citizens would result in increased civic pride and stronger community.¹⁵⁹ Progressives presumed that, if faced with the duty of choosing leaders and policies that affect their immediate surroundings, city residents would turn to each other for aid in sorting through matters of public affairs and in discovering the common good.¹⁶⁰ To illustrate such thinking, Ernest Griffith quotes a spokesman for the Federated Improvement Association of Cincinnati, where he observes that "it is in cities that men, if given the chance of home rule, will learn most[] quickly the true foundation principles on which rests real freedom in representative democracy."¹⁶¹ Citing similar excerpts of Progressive rhetoric, Griffith demonstrates that, during the early twentieth century, forms of local power were associated with morality, safety, honesty, and the public interest.¹⁶²

Even with the home rule achievements of the Progressive era, it is clear that

¹⁵⁸ Briffault, *supra* note 135, at 10 (footnote omitted).

¹⁵⁹ See DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* 53 (2004). Quoting a United States Senator representing Oregon, Jonathan Bourne, Jr., Smith and Tolbert illustrate the Progressive attitude toward the initiative and referendum system:

The system encourages every citizen . . . to study the problems of government, city and state, and to submit whatever solution he may evolve for the consideration and approval of others. The study of the measures and arguments printed in the publicity pamphlet is of immense educational value. The system not only encourages the development of each individual, but tends to elevate the entire electorate to the plane of those who are most advanced. How different from the system so generally in force, which tends to discourage and suppress the individual!

Id. (citation omitted).

¹⁶⁰ See Briffault, *supra* note 135, at 89 (discussing local government and its response to local demands).

¹⁶¹ GRIFFITH, *supra* note 150, at 117.

¹⁶² *Id.* at 117. The full quote from the Federated Improvement Association of Cincinnati spokesman follows:

Cities are playing a more and more important part in the life of the nation . . . in cities men have many interests in common to all, such as the use of the streets, police, fire and health protection. . . . [There men] learn best how to work together, learn best the great truth that each must give up something for the good of all . . . it is in cities that men, if given the chance of home rule, will learn mostly quickly the true foundation principles on which rests real freedom in representative democracy.

Id.

federal law does not guarantee local power. David Berman emphasizes this point by reminding readers of the structural vulnerability of localism with a colorful excerpt from Judge Dillon, who, while serving as a federal judge, authored the reigning rule for municipalities' relationship to states:

There is no doubt about the formal legal status of the approximately 87,000 units of local government in this country: they are at the bottom of the hierarchy of government, at the mercy of the states. To quote from the highly respected nineteenth-century authority on municipal law, Judge John F. Dillon, who did not mince words: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. . . . We know of no limitation of this right so far as corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature."¹⁶³

Given the statutory limits of local government, localism is "largely a product of institutional arrangements and political values."¹⁶⁴ Even so, in certain matters, these arrangements wield just as much power as any state statute. Such is the argument of Richard Briffault in his challenge to Gerald Frug's claim that the courts are eroding local power.¹⁶⁵ Briffault demonstrates that, in cases concerning school finance and exclusionary zoning legislation within suburbs, courts have ruled in favor of local power.¹⁶⁶ For about a decade, starting in the late 1960s, state courts throughout the country would hear cases brought against localities over school finance and zoning laws.¹⁶⁷ In these cases, the plaintiffs' general contention was that these laws promoted inequality among communities:

These two reform campaigns were pursued in the name of equality and their goals were interrelated. School finance reform would sever the link between local wealth and the quality of local education by having the states assume a greater degree of financial responsibility for public schools. Reducing the local role in school financing would ease local tax burdens and reduce the fiscal incentive to zone out lower-income residents. The attack on exclusionary zoning was aimed at opening up the suburbs to less expensive housing and thus to less affluent people. The economic integration of the suburbs would mitigate interlocal disparities in taxable wealth and public services.¹⁶⁸

Plaintiffs argued that states must assume their rightful authority over local governments by altering laws in order to protect the rights of all citizens.¹⁶⁹ In the vast majority of cases, the court ruled in favor of local law,¹⁷⁰ upholding local government's authority to manage and fund education, property, and de-

¹⁶³ BERMAN, *supra* note 155, at 2 (quoting *City of Clinton v. Cedar Rapids and Mo. River R.R.*, 24 Iowa 455, 475 (1868)).

¹⁶⁴ Briffault, *supra* note 135, at 91.

¹⁶⁵ *Id.* at 1059-60.

¹⁶⁶ *Id.* at 3.

¹⁶⁷ *Id.* at 23.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 24-25, 27.

¹⁷⁰ *Id.* at 25 (footnotes omitted).

velopment, agreeing with the defendant states to treat it not as a creature of the state, but as a "representatives of local residents, making local public policy on behalf of its local constituents."¹⁷¹ For the most part, the same is true for state legislatures; in reform efforts to equalize school funding by way of legislating state aid, states continue to respect the fiscal autonomy of localities in order to fund education at their discretion.¹⁷² In attempts to control the development of land impacting the environment (*i.e.*, beyond the host locality), states have limited their authority by a number of measures, such as permitting host localities to retain initial controls over land and providing them with the power to reject development proposals.¹⁷³

An idea reflected in the title of his article, "Our Localism," Briffault claims that the logic behind the legislative and judicial practices of arranging law to protect local autonomy is America's ideological commitment to localism.¹⁷⁴ It is the "ideological strength of localism" that allows the principle to be "tacit or de facto"¹⁷⁵ and, at the same time, exercise a dominant institutional presence.¹⁷⁶ According to Briffault, the problem with this arrangement, which lacks a constitutional foundation and is propped up by ideology, is that it has not been subjected to a formal evaluation of its goals, effects, and externalities, which has resulted in the promotion of "interlocal inequality."¹⁷⁷

In school finance cases, courts rejected reformist proposals for state-imposed spending caps on education or arrangements for wealthier districts to pay aid to poorer districts, citing provisions of home rule that allow local governments to allocate funds at their discretion.¹⁷⁸ In cases of local land use planning, courts upheld practices of exclusionary zoning. These practices effectively prevented lower-income families from taking up residence within the localities in question, which allowed localities to preserve the "local status quo in the community" by controlling growth and maintaining community resources.¹⁷⁹ Based on these cases, Briffault observes:

The same legal authorizations and restrictions may add up to real power for one set of local entities but provide only the illusion of power for the others. . . . [T]he differences in local needs and conflicts among local interests make the very concept of local power as a general matter, considered apart from the situations of particular local government and people, inherently ambiguous.¹⁸⁰

¹⁷¹ *Id.* at 23.

¹⁷² *See id.* at 59 n.257.

¹⁷³ *See id.* at 3-4.

¹⁷⁴ *Id.* at 1-2.

¹⁷⁵ *Id.* at 114..

¹⁷⁶ *Id.* at 114.

¹⁷⁷ *See id.* at 112.

¹⁷⁸ *Id.* at 28-32.

¹⁷⁹ *Id.* at 44-46.

¹⁸⁰ *Id.* at 114.

The legal practice of ambiguous localism has led to disparity, attitudes of provincialism, and social tension among communities.¹⁸¹ For Briffault, these problematic consequences justify state action to broaden the scope of lawful authority over localities in order to promote equal protection.¹⁸²

Legal scholars demonstrate that, within United States law, localism lacks consistent structure, and the meaning of localism shifts depending on the characteristics of a community.¹⁸³ Multiple definitions of the principle of localism have been theorized over time.¹⁸⁴ It appears that the most stable aspect of localism is its mutability.

IV. BROADCAST LOCALISM POST 1996

Media policy scholars argue that the FCC mostly fails to promote localism, first, by neglecting to adopt firm criteria to define localism, and second, by neglecting to establish strict rules to implement its definition.¹⁸⁵ This perspective rests on the belief that policymakers introduced localism to the system of broadcasting by way of a decentralized structure of local licensing for the purpose of democratic ends.¹⁸⁶ However, despite being an ideologically powerful concept rooted in American political tradition, broadcast localism's strength is questionable given its unsteady record. As within municipal law, the meaning of localism in broadcast regulation shifts with the political and social context. For example, in the 1920s, localism represented community (and particularly, rural) autonomy;¹⁸⁷ in the 1940s, localism was synonymous with community programming;¹⁸⁸ in the 1980s, the principle was associated with the improved financial standing of stations.¹⁸⁹

Due to the lack of certainty about localism, there is an analytic need to inter-

¹⁸¹ See *id.* at 1-2, 5-6, 14, 18-19, 21, 50-51, 58.

¹⁸² *Id.* at 7-8, 113.

¹⁸³ See *id.* at 4-5, 51, 57-58, 75-77; Rodriguez, *supra* note 138, at 627.

¹⁸⁴ Rodriguez, *supra* note 138, at 627, 632-34 (summarizing legal scholarship characterizing localism).

¹⁸⁵ See NAPOLI, *supra* note 2, at 215 ("Clearly, localism policymaking has suffered from severe ambiguity in terms of what exactly constitutes local programming. This operational ambiguity hinders coherent and consistent policymaking, as the evaluative criteria are constantly shifting."); Cole & Murck, *supra* note 2, at 341; Collins, *supra* note 3, at 555-56.

¹⁸⁶ See *supra* Part II.

¹⁸⁷ See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 359-61 (1990) (discussing suburban growth and the incorporation of communities with "suburban character"); see also *id.* at 372 (discussing the impact of the widespread adoption of zoning laws).

¹⁸⁸ See Akilah N. Folami, *Deliberative Democracy on the Air: Reinvigorate Localism—Resuscitate Radio's Subversive Past*, 63 FED. COMM. L.J. 141, 154-55 (2010) (examining the adoption of the FCC's Chain Broadcasting Order and the Main Studio rule).

¹⁸⁹ See *id.* at 183-84 (explaining how deregulation during the 1980s led to increased ownership of radio stations by conglomerates who consolidated stations to increase profits).

rogate the meaning of localism in every case of its mention. When it is introduced into political debate and efforts are made to codify the principle, it is necessary to examine which definition of the principle is invoked and to consider the reasons behind its introduction. I adopt this approach in exploring the Commission's localism pursuits during the years following the passage of the Telecommunications Act of 1996 ("the Act").

One consequence of the Telecommunications Act was a rapid consolidation of radio companies. Despite the Act's stated purpose of promoting a more competitive market, the Act significantly reduced the number of competitors in radio:

There were more than 10,400 commercial radio stations in the United States when the Telecom Act went into effect in 1996. During the two-year industry-wide shopping spree that followed the relaxed regulations, media companies bought and sold more than 4,400 of them, over 40 percent of the field, reducing the number of individual owners by 700 (or about 14 percent).¹⁹⁰

By spring 2002, the ten largest national radio companies controlled two-thirds of the market share, and 40 percent belonged to the two largest companies—Clear Channel and Viacom.¹⁹¹

With national radio companies doing most of the buy-outs, local ownership dropped considerably: "[I]n almost every metropolitan area, the four largest firms together had over 70 [percent] market share," and "[t]hat figure generally exceeded 90 [percent] in smaller markets."¹⁹² Often, the sale of a local station to a national company was followed by a format change, the introduction of new on-air personalities, and less airtime for information that is location-specific.¹⁹³ Behind the scenes, main studios were vacated, local personnel were fired, and distribution networks were established in order to air centralized programming on stations throughout the country.¹⁹⁴

¹⁹⁰ KLINENBERG, *supra* note 26, at 27.

¹⁹¹ Peter DiCola, *Employment and Wage Effects of Radio Consolidation*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 57, 59 (Philip M. Napoli ed., 2007) (citing PETER DiCOLA & KRISTIN THOMPSON, FUTURE OF MUSIC COAL., RADIO DEREGULATION: HAS IT SERVED CITIZENS AND MUSICIANS 18 (2002), available at <http://commcns.org/Va1KY6>).

¹⁹² *Id.* (citing PETER DiCOLA & KRISTIN THOMPSON, FUTURE OF MUSIC COAL., RADIO DEREGULATION: HAS IT SERVED CITIZENS AND MUSICIANS 18 (2002), available at <http://commcns.org/Va1KY6>).

¹⁹³ Cf. PETER DiCOLA & KRISTIN THOMPSON, FUTURE OF MUSIC COAL., RADIO DEREGULATION: HAS IT SERVED CITIZENS AND MUSICIANS 18 (2002), available at <http://commcns.org/Va1KY6> (listing the author's concerns with "oligopoly power in radio": less focus on consumers; higher advertising prices; concentrated control of information; and less access and less leverage for musicians).

¹⁹⁴ DiCola, *supra* note 191, at 61; KLINENBERG, *supra* note 26, at 27; Nina Huntemann, *Corporate Interference: The Commercialization and Concentration of Radio Post the 1996 Telecommunications Act*, 23 J. COMM. INQUIRY 390, 401 (1999); Michael J. Aguilar, Note, *Micro Radio: A Small Step in the Return to Localism, Diversity, and Competitiveness in Broadcasting*, 65 BROOK. L. REV. 1133, 1168-69 (1999); Arthur Martin, Comment, *Which*

Such changes did not resonate well with several groups, including listeners who lost their beloved local radio station, citizen organizations who recognized a general weakening of the public interest in local affairs, and radio professionals who lost their employment at local stations due to ownership changing hands. By the end of the decade, the FCC was aware of the dissatisfaction over the changes to radio.¹⁹⁵ In response to criticism that it was not safeguarding the public interest, the Commission initiated a series of actions in an effort to strengthen the seemingly endangered broadcast localism.¹⁹⁶ In January 2000, the FCC established LPFM service after receiving thousands of complaints over the effects of radio company consolidation.¹⁹⁷ In preparation for the new license, Chairman William Kennard justified LPFM service as one solution to what he termed the “unprecedented feeding frenzy”:

The jury is still out whether consolidation will be in the long run better for consumers. But we know one of the immediate impacts is that it's harder for smaller businesses and less conventional broadcasters to get access to the airwaves. Low-power FM is a counter-insurgency, an effort to give the airwaves back to local communities in ways that allow local voices—musicians, churches, non-profits, community groups, minority companies, small business—to speak to their communities.¹⁹⁸

After a yearlong period of hearing comments and weighing positions on the service, the Commission created a noncommercial, low-power radio license for local, nonprofit organizations that resulted in the introduction of over 800 stations to the airwaves.¹⁹⁹

A few years after the establishment of LPFM service, Chairman Michael Powell announced his decision to launch a “localism in broadcasting” initiative consisting of a three-prong effort.²⁰⁰ The initiative includes the accelerated activation of LPFM stations, the creation a Localism Task Force to study the topic and conduct public hearings, and delivery of a *Notice of Inquiry* on local-

Public, Whose Interest? The FCC, the Public Interest, and Low-Power Radio, 38 SAN DIEGO L. REV. 1159, 1160-62 (2001); Prindle, *supra* note 3, at 316.

¹⁹⁵ Aguilar, *supra* note 194, at 1167-68.

¹⁹⁶ *Id.* at 1172-74.

¹⁹⁷ *Low Power FM Broadcast Radiion Stations (LPFM)*, FCC ENCYCLOPEDIA, <http://commcns.org/11Cc50A> (last visited Jan. 7, 2013). The Low Power FM (LPFM) stations are only for noncommercial educational broadcasting and operate with an effective radiated power (ERP) of 100 watts or less. LPFM is not for commercial purposes. *We Won! Senate Joins House in Passing the Local Community Radio Act!*, PROMETHEUS RADIO PROJECT, <http://commcns.org/W9b75n> (last visited Jan. 7, 2013).

¹⁹⁸ Greg Kot, *Micro Waves: It's 1,000-watt Radio Stations Versus Thousands of Corporate Stations in a Lopsided Battle for the Airwaves*, CHI. TRIB. (Oct. 20, 1999), <http://commcns.org/WaSVt4>.

¹⁹⁹ *In re Creation of Low Power Radio Service, Report and Order*, 15 F.C.C.R. 2205, ¶ 1 (Jan 20, 2000) [hereinafter LPFM Report and Order]; see also PROMETHEUS RADIO PROJECT, *supra* note 197.

²⁰⁰ Press Release, FCC, FCC Chairman Powell Launches “Localism in Broadcasting” Initiative (Aug. 20, 2003), available at <http://commcns.org/V8nnnP>.

ism.²⁰¹ In the Commission's press release on the initiative, Powell provided an explanation for his decision: "[W]e heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns."²⁰² Additionally, Powell noted recent Senate Commerce Committee hearings that highlighted the recognition of the "issue of localism in broadcasting."²⁰³ As part of the localism endeavor, the FCC held public hearings on broadcast localism in five states—Maine, North Carolina, Texas, South Dakota, and California—and Washington, DC, providing citizens the opportunity to share their experiences with local broadcasting directly with commissioners.²⁰⁴ Additionally, as promised, in 2004 the Commission issued a *Notice of Inquiry* on Broadcast Localism.²⁰⁵

The rest of this article addresses the significance of LPFM service and the Localism Proceeding. Feeling pressure from citizen groups, members of the public, and members of Congress, the FCC made efforts to address what invested parties claimed to be a blatant lack of broadcast localism.²⁰⁶ In the meantime, the Commission ensured that it addressed the interests of the broadcast industry and the constraints of the regulatory system.²⁰⁷ How did the FCC do this? What kind of localism did the FCC promote within the system following the enactment of the Telecommunications Act? Why did the FCC select this form of localism during this period? By considering these questions, this article attempts to comment on the shapes of localism that are currently relevant and the precarious line that the FCC walks when managing matters concerning the public interest.

A. Low Power FM as a Conduit for Localism

Since the establishment of LPFM service in 2000, the FCC and political leaders have deemed localism as the rationale behind its existence. In her statement on the *Report & Order* that creates LPFM service, Commissioner Gloria Tristani declared that the LPFM order "promotes localism and diversity not by limiting the rights of existing voices, but by adding new voices to the mix."²⁰⁸ Similarly, in his statement on the proposed Low Power Radio Act of 2004, for which he was one of the primary sponsors, Senator John McCain

²⁰¹ Frank James, *FCC Orders Study on Media 'Localism': Embattled Chief Tunes in to Critics*, CHI. TRIB. (Aug. 21, 2003), <http://commcns.org/VMGw0Y>.

²⁰² Press Release, FCC, *supra* note 200.

²⁰³ *Id.*

²⁰⁴ See Broadcast Localism NOI, *supra* note 21, ¶ 6.

²⁰⁵ Broadcast Localism NOI, *supra* note 21.

²⁰⁶ See Press Release, FCC, *supra* note 200.

²⁰⁷ See generally *id.*

²⁰⁸ LPFM Report and Order, *supra* note 199, at 2327 (statement of Comm'r Tristani).

noted that:

Rampant ownership consolidation has taken place in the radio industry since passage of the Telecommunications Act of 1996. Since that time, many Americans have complained that the large media conglomerates fail to serve local communities' interests and seem to use their local station license as a conduit to air national programming. Low Power FM was introduced, in part, to respond to such complaints.²⁰⁹

In statements of support for LPFM, low power broadcasting is described as holding the key to localism's proliferation by way of small radio operations carrying local voices. This rhetoric attempts to legitimize the FCC's controversial move to further populate the broadcast spectrum with signals from non-commercial, low-power, low-budget stations—a decision resisted by the broadcast industry, public radio, and many legislators.²¹⁰ The benefits of localism are cited as justification for LPFM to its staunch opposition and to appeal to the reform activists and radio enthusiasts who criticize the Commission for allowing the deterioration of local radio. In these statements, LPFM radio is the mechanism, and localism is the clear, attainable goal of the service.

By setting parameters for licensee eligibility and broadcast operations by way of license criteria, the FCC seeks to establish a type of local radio that is narrow in geographic scope, insular in content, and interactive for listeners. It is a localism primarily created by a low effective radiated power ("ERP"), what the FCC refers to as the "local nature of this service."²¹¹ An ERP of 100 watts, with an average signal range of 3.5 miles, profoundly narrows the size of the audience.²¹² The FCC stands by the low ERP, claiming that a larger service area could "diminish" what commenters called "the local aspect of LPFM service."²¹³ Intending to contain the communicative experience of LPFM radio by its management of LPFM's terrestrial signal, the FCC requires licensees to imagine their audience as limited in size.²¹⁴

To further cultivate intimacy between licensee and listener, the FCC elected to demarcate an LPFM station's "community of license" by the anticipated reach of its signal.²¹⁵ The Commission defines an LPFM station's "community" as "the very small area and population group that will make up the potential

²⁰⁹ 150 CONG. REC. 11,556 (2004) (statement of Sen. John McCain).

²¹⁰ LPFM Report and Order, *supra* note 199, ¶¶ 1, 4, 5, 17.

²¹¹ *Id.* ¶¶ 7, 13, 166.

²¹² *See id.* ¶¶ 7, 13, 14, 44.

²¹³ *Id.* ¶ 4.

²¹⁴ For a discussion of how LPFM's structure is reflective of the "reformist" nature of the service, see JAMES HAMILTON, DEMOCRATIC COMMUNICATIONS: FORMATIONS, PROJECTS, AND POSSIBILITIES 139-45 (2008).

²¹⁵ In keeping with the localism doctrine, the FCC requires each broadcast station to address its community of license, which it defines as "the principal community or other political subdivision which [the broadcast station] primarily serves." The Commission recognizes the "geographical station location" as a station's "principal community." *See* 47 C.F.R. § 73.1120 (2011) (station location).

service area and audience of an LPFM station.”²¹⁶ Put another way, it determines the community by ERP and transmission coordinates. This is particularly significant considering that this method of defining community is different from the approach applied to full power broadcasters. Both commercial and noncommercial full power FM licensees identify their community of license using the FCC’s Table of Allotments, which the Commission adopted in 1963 following a lengthy rulemaking process and the establishment of a revised classification scheme for FM stations.²¹⁷ Alan Stavitsky and Tad Odell explain that this system of FM licensing allocated signals to communities, “and prospective broadcasters were invited to apply for stations.”²¹⁸ Therefore, when the FCC assigns a full power FM licensee a particular channel, it also assigns a specific community of license to the broadcaster.²¹⁹

For purposes of this discussion, it is important to note that by not requiring LPFM applicants to reference the Table of Allotments, the FCC attempts to instill an organic relationship between the LPFM licensee and the community of license. Unlike the full power licensee’s prearranged relationship between channel and community, once the LPFM broadcaster has secured approval from the FCC for its proposed frequency and coordinates of transmission, its community of license is identified simply as the reach of its signal. The FCC designs the closest thing to a natural relationship between broadcaster and listeners, rather than treating community as a negotiable condition of a contract, as it does with full power broadcasting.²²⁰

²¹⁶ LPFM Report and Order, *supra* note 199, ¶ 25 (citations omitted).

²¹⁷ STERLING & KITROSS, *supra* note 74, at 414 (“Class A, low power (100 watts to 3,000 watts), and a restriction on antenna height to 300 feet above average terrain leading to a service radius of about 15 miles, and a distance between stations on the same channel of 65 miles; Class B (5 kw to 50 kw), 500-foot limit, 40-mile service radius, and 150-mile co-channel spacing; and Class C, high power (25 kw to 100 kw), 65-mile service radius, and 180-mile co-channel spacing. Using these standards, the commission assigned nearly 3,000 potential stations to about 1,800 communities.”).

²¹⁸ Alan G. Stavitsky & Tad Odell, *Spectrum Efficiency and Public Interest*, 50 J. BROAD. & ELEC. MEDIA 692, 693 (2006).

²¹⁹ While the Table does not recognize every community in the United States and its territories, current and prospective licensees may petition the FCC to amend the Table by adding new channels on behalf of unrecognized communities. See *In re Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 F.C.C.R. 14,212, ¶¶ 4-6 (Nov. 3, 2006).

²²⁰ A full power licensee can apply to change its community of license. Approval of this request depends on whether the Commission determines that the move is in accordance with fair allocation objectives. Though this process is not without conflict, it has continued to exist for as long as the FCC has utilized the Table in licensing decisions. Further, the FCC has simplified the process by adopting procedures to streamline city of license modifications, allowing licensees to file for the change with a minor modification application. These applications may be filed at any time. See *id.* For a more complete discussion of the proposal to simplify the community of license modification process and the previous, more

It is the permitted ease with which LPFM licensees serve their community that is of note here. LPFM licensees are exempt from a number of requirements that the FCC imposes on full power licensees, such as meeting technical standards in covering the predetermined community of license.²²¹ Full power licensees adhere to the Main Studio Rule—albeit relaxed adherence—which stipulates that a station’s primary studio must be located within “the principal community contour of any station in any service licensed to the community of license” or twenty-five miles from the center of the community of license,²²² and “be capable of originating and transmitting local programming.”²²³ Additionally, full power licensees must maintain a local public inspection file and make it available for public inspection during business hours.²²⁴ The FCC explains that it is unnecessary to apply such rules to LPFM licensees, as the ERP limits render them local in nature.²²⁵

Beyond broadcast power, the FCC safeguards the intimacy of LPFM’s localism by designating the service noncommercial.²²⁶ Because increased ratings mean higher advertising revenue, commercial broadcasters consistently attempt to improve the size of their audience.²²⁷ According to the FCC, the tendency to expand coverage interferes with a station’s ability to meet the inter-

cumbersome rule making process, see generally *In re Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, *Notice of Proposed Rule Making*, 20 F.C.C.R. 11,169 (June 9, 2005).

²²¹ For commercial licensees, the FCC requires that “a minimum field strength of 70 dB above one $\mu\text{V/m}$ (dBu), or 3.16 mV/m , will be provided over the entire principal community to be served,” and “the 1 mV/m contour encompasses the urban population within the area to be served.” See *FM Transmitter Location*, 47 C.F.R. § 73.315(a), (c) (2010). For non-commercial licensees, “a minimum field strength of 1 mV/m (60 dBu) will be provided over at least 50 percent of its community of license or reach 50 percent of the population within the community.” See *NCE FM Transmitter Location*, 47 C.F.R. § 73.515 (2011).

²²² *Station Main Studio Location*, 47 C.F.R. § 73.1125(a) (2011); see also David M. Silverman & David N. Tobenkin, *The FCC’s Main Studio Rule: Achieving Little for Localism at Great Cost for Broadcasters*, 53 FED. COMM. L.J. 469, 490-491 (2001).

²²³ See Silverman & Tobenkin, *supra* note 113, at 486.

²²⁴ A commercial radio broadcaster’s file must include the following: a copy of the current FCC authorization to construct or operate the station, license and renewal application materials; copies of every citizen agreement; all service contour maps; the most recent ownership report; records of broadcasts by political candidates; all written comments by the public; materials related to FCC investigations or complaints, a copy of the Commission’s educational publication, “The Public and Broadcasting”; time brokerage and joint sales agreements; and a list of programs of the preceding three months that have addressed community issues. See 47 C.F.R. § 73.3526 (2011). A noncommercial licensee’s file must include much of the same with the exception of time brokerage and joint sales agreements. It also must include a list of donors supporting programs. See 47 C.F.R. § 73.3527 (2011).

²²⁵ LPFM Report and Order, *supra* note 199, ¶2.

²²⁶ *Id.* ¶¶ 1, 5, 15-17.

²²⁷ *Id.* ¶ 17.

ests of small community groups.²²⁸ In the *LPFM Report and Order*, the Commission explains, “We are concerned that these commercial incentives could frustrate achievement of our goal in establishing this service: to foster a program service responsive to the needs and interests of small local community groups, particularly specialized community needs that have not been well served by commercial broadcast stations.”²²⁹

In addition to prohibiting LPFM stations from advertising, the FCC attempts to squelch the temptation to expand by capping the number of stations a licensee can own to one.²³⁰ These attempts to stifle the broadcaster’s inclination to grow its audience and income are a means of implementing a type of localism constituted by a small group of participants who are located in the same place. The rules of prohibition—i.e., a licensee cannot air advertisements or form or join a network—in conjunction with the limited ERP effectively construct spatial boundaries that limit the actions of LPFM licensees. Clearly, there is a world beyond signal reach, but, unlike commercial and other noncommercial licensees with the regulatory capacity to expand coverage, an LPFM licensee must be content to only serve the original community of license.

These rules effectively limit programming resources, station founders, and listeners. The FCC states that the local production of programming is the heart of LPFM’s localism.²³¹ For a program to originate locally, it must be produced within ten miles of an LPFM station’s transmitting antenna (and within twenty miles for rural areas).²³² Although the FCC does not require a minimum amount of locally originated programming from LPFM licensees, it uses local origination as one criterion of a point system in cases of mutual exclusivity.²³³

The FCC enforces a “local ownership restriction” requiring that “all LPFM applicants must be based within [ten] miles of the station they seek to operate”—the approximated distance traveled by the signal.²³⁴ “This means that the applicant must be able to certify that it or its local chapter or branch is physically headquartered, has a campus, or has 75 percent of its board members residing within [ten] miles of the reference coordinates of the proposed transmit-

²²⁸ See *id.* ¶¶ 9, 17, 26, 29, 33.

²²⁹ *Id.* ¶ 17.

²³⁰ *Id.* ¶¶ 26-29.

²³¹ *In re Creation of A Low Power Radio Service, Third Report and Order and Second Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 21,912, ¶ 24 (Nov. 27, 2007) [hereinafter *LPFM Third Report and Order*] (“[W]e view local origination as a central virtue of the LPFM service.”).

²³² *Id.* ¶ 25.

²³³ When two or more applicants are competing for the same frequency, the FCC assesses which one is most deserving by applying a point to applicants that pledge to air at least 8 hours of locally originated programming a day. *LPFM Report and Order*, *supra* note 199, ¶ 144.

²³⁴ *Id.* ¶ 33.

ting antenna.”²³⁵ Once again allowing the presumed signal reach determined by ERP limits to demarcate where local service ends, the FCC deems those residing within the area of coverage as members of the community. The FCC stated its “preference for local licensees . . . rests on [the Commission’s] predictive judgment that local entities with their roots in the community will be more attuned and responsive to the needs of that community”²³⁶ Thus, the only acceptable licensees of a local radio station are those who belong to the place. Invoking the vision of a place-based, homogeneous community,²³⁷ the rule operates in accordance with the belief that community members hold a deep understanding for their community’s character. In its most recent revision of the LPFM rules, the FCC affirms the importance of the local ownership restriction: “Although growing in both usage and recognition, LPFM service is still in its nascence and doing away with the locality restriction could threaten its predominantly local character, in particular the hallmark of a LPFM station’s local character, its local origination of programming.”²³⁸ Thus, the FCC hypothesizes that a radio station composed of people originating from the local place undoubtedly generates programming that addresses the needs of the local listeners.

With its set of rules for LPFM radio, the FCC attempts to institute a particular kind of localism—one that is geographically focused, spatially contained, and physically present. Interestingly, it is a form of localism that several notable scholars of media policy describe as nearing obsolescence and in desperate need of rethinking. Sandra Braman,²³⁹ Andrew Calabrese,²⁴⁰ Philip Napoli,²⁴¹ and Alan Stavitsky²⁴² consider how broadcast regulations intended to promote localism often do not result in the production of programming that satisfies local publics, nor do they lead to the creation of meaningful relationships between station owner and audience. Each claims that a reason for this failure of intended effects is the changing material and social conditions that affect formations of community.

Sociologists, anthropologists, cultural geographers, and communication scholars have for many years explored developments in the area of communication and markets. Many scholars focus on how technological, political, and

²³⁵ *Id.* ¶ 33.

²³⁶ *Id.* ¶ 34.

²³⁷ See GRAHAM DAY, *COMMUNITY AND EVERYDAY LIFE 1* (2006) (defining community as “those things which people have in common, which bind them together, and give them a sense of belonging with one another”).

²³⁸ LPFM Third Report and Order, *supra* note 231, ¶ 24.

²³⁹ Braman, *supra* note 3, at 231.

²⁴⁰ Calabrese, *supra* note 3, at 257.

²⁴¹ NAPOLI, *supra* note 2, at 224.

²⁴² See Alan Stavitsky, *The Changing Conception of Localism in U.S. Public Radio*, 38 J. BROAD. & ELEC. MEDIA 19, 21 (1994).

economic developments of the nineteenth, twentieth, and twenty-first centuries altered the shape and activities of communities, broadening awareness for, and enhancing capacity to interact with people around the globe.²⁴³ Given the global movement of people, material, and information, location arguably is no longer determinative of the community experience. Therefore, it is reasonable to question the significance of broadcast rules intended to promote communication for strengthening local bonds. In her article on the localism principle in communication policy, Braman explicitly makes this point:

Qualitative changes in the nature of society since the early twentieth century and in the nature of broadcasting over the last few decades weaken the validity of many of the assumptions that underlie contemporary regulatory approaches. These include such notions as the idea that the physical presence of a broadcasting station within a local community ensures that the station provides that community with a meaningful voice and that local communities continue to be the loci of important political decisions to which local TV discourse might contribute.²⁴⁴

Similarly, in his effort to imagine a broadcast localism accounting for the technical and social realities of communication that defy spatial boundaries, Calabrese suggests that localism rules are written to jointly recognize the presence of geographic and interest based connections as part of the experience of community.²⁴⁵ Maintaining that media policy should continue to promote the circulation of information among geographically bound communities, it is necessary to acknowledge social connections that are “translocal.”²⁴⁶ He explains,

[B]ecause the focus of public life has long been disconnected from specific localities, a commitment to local participation must not only be a commitment to community life within specific geographic locales, but also to community life at a grassroots that transcends locale. Any meaningful concept of localism would of course need to reflect such an understanding of how the local and the translocal are related.²⁴⁷

Napoli echoes this claim when he declares a strictly spatial designation of community as “no longer sufficient in the new media environment.”²⁴⁸ At a moment when communication technologies continue to expand notions of community by simultaneously, and paradoxically, challenging and strengthening geographically situated publics, the cultural relevance of broadcast localism depends on its reinvention through policy.²⁴⁹ It is essential that regulations “reflect the increasing diversity of means by which [political and cultural ex-

²⁴³ See ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 77 (1990); Joshua Meyrowitz, *No Sense of Place: The Impact of Electronic Media on Social Behavior*, in *THE MEDIA READER: CONTINUITY AND TRANSFORMATION* 99, 100 (Hugh Mackay and Tim O’Sullivan eds., 1999); DAVID MORLEY, *HOME TERRITORIES: MEDIA, MOBILITY AND IDENTITY* 3 (2000).

²⁴⁴ Braman, *supra* note 3, at 234.

²⁴⁵ Calabrese, *supra* note 3, at 257.

²⁴⁶ *Id.* at 257.

²⁴⁷ *Id.* at 257.

²⁴⁸ NAPOLI, *supra* note 2, at 222.

²⁴⁹ NAPOLI, *supra* note 2, at 222-24.

changes] are carried out.”²⁵⁰

Given the dated vision of local community articulated in the LPFM rules, it is important to question why the service garnered the support of political leaders, citizens, and media experts. One explanation is that the service embodied a character that is deeply contrary to that of national radio companies pursuing consolidation.²⁵¹ By criteria deemed to have a “local nature,” LPFM stations are designed to be small, independent stations run by community insiders who frown upon syndicated programming, and fueled by the charity of the small populations they reach.²⁵² In essence, the form of radio constructed by the service rules is the antithesis of a company like Clear Channel. LPFM’s structural features suit the spectrum, power, and revenue constraints of the broadcast system that the FCC confronts in its ongoing effort to preserve the status quo. At the same time, the structure of LPFM radio appeases critics of consolidated radio since low power radio resembles the other extreme.²⁵³ It is also worth noting that within the first decade of service, many LPFM stations have confronted numerous challenges in their effort to survive in a system largely comprised of advertising- and network-oriented stations.²⁵⁴ Between poor signal coverage, fundraising difficulties, and understaffed operations, LPFM stations understand the constraints of being small, and lacking power, as well as independent ownership.²⁵⁵

B. Localism Proceeding

The 2004 *Notice of Inquiry on Broadcast Localism* identified a number of topics pertinent to localism, including the rules overseeing television networks and their affiliates, public files, license renewals, forms of payola, national radio company practices of voice tracking and assigning national playlists, and the production of community-responsive programming.²⁵⁶ Before the release of the *NOI*, the Commission opened a docket on “enhanced disclosure,” releasing the *Enhanced Disclosure Notice of Proposed Rulemaking* in 2000,²⁵⁷

²⁵⁰ NAPOLI, *supra* note 2, at 223.

²⁵¹ See HILLIARD & KEITH, *supra* note 1, at 14; Nina Huntemann, *A Promise Diminished: The Politics of Low Power Radio*, in COMMUNITIES OF THE AIR 76, 76 (Susan Squier ed., 2003); KLINENBERG, *supra* note 26, at 278-79; Keith Brand, *The Rebirth of Low-power FM Broadcasting in the U.S.*, 11 J. RADIO STUD. 153 (2004); Martin, *supra* note 196; Cynthia Conti, *Low-Power Broadcasting in the U.S.: Rules and Practices of Localism* 3-4, 15 (2011) (unpublished Ph.D. dissertation, New York University) (on file with author).

²⁵² See Conti, *supra* note 251, at 77.

²⁵³ See 150 CONG. REC. 11,556 (2004) (statement of Sen. John McCain).

²⁵⁴ See Conti, *supra* note 251, at 214-15, 219.

²⁵⁵ See *id.* 214-15.

²⁵⁶ See Broadcast Localism NOI, *supra* note 21, ¶¶ 30-45.

²⁵⁷ *In re Standardized and Enhanced Disclosure Requirements for Television Broadcast*

[W]hich proposed to replace the issues/programs lists with standardized form. The proposed form asks broadcasters to report on their efforts to identify the programming needs of various segments of their communities, and list their community-responsive programming by category. The *Enhanced Disclosure NPRM* also proposed that broadcasters make these forms, as well as the rest of their public inspection files, available on the Internet, and sought comment on a proposal to encourage stations to use their websites to conduct online discussions and facilitate interaction with the public.²⁵⁸

This proposal would revise the contents of the public inspection file in order to make it both easier for licensees to report on their community service programming, and for viewers to evaluate the work of their television broadcasters.²⁵⁹ When evaluated alongside other issues the FCC identified as matters of localism, the endurance of the enhanced disclosure proposal is noteworthy. Three and a half years after the *NOI*, the FCC listed enhanced disclosure as a top priority in the combined *Broadcast Localism Report* and *NPRM*.²⁶⁰

Related to enhanced disclosure, the FCC also articulated a firm commitment to update *The Public and Broadcasting*, which is a document that educates the public on the service obligations of local broadcasters.²⁶¹ Even though the Commission looks to the public to assist in evaluating the performance of broadcasters, often both listeners and viewers are unaware of the duties of licensees. In the 2008 *NPRM*, the FCC states that through *The Public and Broadcasting*, it intends to “provide an effective means by which to inform members of the public of the specific obligations of the stations that are licensed to serve them, and the various operating rules with which licensees must comply.”²⁶² Several months later, the FCC released the updated version of *The Public and Broadcasting* guide. Its contents include an explanation of the broadcast licensing system and the FCC’s role within it, general principles of broadcast content regulation, rules around different types of programming and advertising, and a description of the required contents of the local public inspection file.²⁶³ The guide encourages members of the public to voice their concerns regarding a broadcast station’s performance; first, to station management and then, if necessary, to the FCC if they “feel the need to do so.”²⁶⁴ The guide explains that an audience member may also file a “petition to deny”

Licensee Public Interest Obligations, *Notice of Proposed Rule Making*, 15 F.C.C.R. 19,816 (Sept. 14, 2000).

²⁵⁸ Broadcast Localism NOI, *supra* note 21, ¶ 10.

²⁵⁹ *Id.* ¶¶ 3-4, 9.

²⁶⁰ *Id.* ¶ 12.

²⁶¹ Broadcast Localism Report & NPRM, *supra* note 22, ¶¶ 15-19.

²⁶² *Id.* ¶ 18.

²⁶³ See generally FCC, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION (July 2008), available at <http://commcns.org/10C9xQW>.

²⁶⁴ *Id.* at 32.

or an “informal objection” to a license renewal application.²⁶⁵ In addition to using the information provided on the Commission’s website regarding the process, an individual may also contact a “broadcast information specialist” to have his or her questions answered directly.²⁶⁶

In addition to delineating enhanced disclosures and the release of an updated guide, the 2008 *Broadcast Localism Report & NPRM* requested comments on several proposals: 1) the mandated convention of permanent advisory boards consisting of representatives from the service area;²⁶⁷ 2) the requirement of twenty-four hour presence at each broadcasting facility;²⁶⁸ 3) the requirement of some amount of locally-oriented programming.²⁶⁹ If enforced, each of these proposals would have required greater action and resources from broadcasters in their efforts to serve the public. Following the comment period, public interest groups in favor of the proposed stricter localism rules awaited the FCC’s announcement of its decisions.

In July 2011, the FCC heard from the Working Group on Information Needs of Communities (“INC”) regarding the matter. Founded at the announcement of the FCC’s “Future of Media” proceeding in 2010, and headed by Steven Waldman, the INC advised the FCC to drop the localism proceeding in its report, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*.²⁷⁰ The report praises the Commission for its efforts towards required disclosure, and echoes an aspiration first mentioned by Powell’s Commission—that the public file should be made accessible online—adding that it should eventually become an exclusively online document.²⁷¹ However, the report states that other potential efforts in the name of localism would amount to wasted resources:

[T]he Commission should terminate the “localism” proceeding and withdraw the localism [NPRM]. While the existing NPRM attempts to advance the worthwhile goal of promoting local media—an aspiration of many of the recommendations in this report—that particular rulemaking includes several unworkable or unnecessarily burdensome ideas, such as a requirement that all stations have around-the-clock staffing.²⁷²

Though the FCC has not formally announced an abandonment of the localism proceeding, it has yet to pursue most of its proposals in the 2008 *Broad-*

²⁶⁵ *Id.* at 11.

²⁶⁶ *Id.* at 33.

²⁶⁷ *Broadcast Localism Report & NPRM*, *supra* note 22, ¶¶ 26, 43–44, 73.

²⁶⁸ *Id.* ¶¶ 17, 87, 111.

²⁶⁹ *Id.* ¶¶ 40, 124.

²⁷⁰ STEVEN WALDMAN, FCC, *THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE* 29 (July 2011), available at <http://commcns.org/LfsIbI>.

²⁷¹ *Id.* at 346–47.

²⁷² *Id.* at 347.

cast *Localism Report & NPRM*, with the notable exception of the Standardized Online Disclosure requirement for full power television broadcast licensees.²⁷³ Seven years after the release of the *Enhanced Disclosure NPRM*, the FCC adopted a *Report and Order* in the proceeding, “requiring television broadcasters to replace their issues/programs lists with Standardized Television Disclosure Form 355 and to post the completed forms online.”²⁷⁴ The Commission’s reasoning behind the introduction of the form was to “facilitate access to the issues/program information,” resulting in greater accountability on the part of broadcasters to their local audiences.²⁷⁵ True to form, debate over the purpose and usefulness of a standard form ensued, with industry petitioners describing the form as “vague, overly complex, and burdensome” and public interest advocates calling for revisions that would enhance the details disclosed by broadcasters.²⁷⁶ In both cases, the parties made characteristic claims regarding the introduction of a new rule (*i.e.*, the scope of the rule was either overbroad or not broad enough).

Beyond calling for stricter disclosure requirements, the comments of public interest advocates on Standardized Television Disclosure Form 355 depict a strategic development in the effort to reform the broadcast system.²⁷⁷ Advocates claimed that the enhanced disclosure form should be “designed to facilitate the downloading and aggregation of data for researchers.”²⁷⁸ It is worth noting that an alliance of public interest groups, collectively identified as the Public Interest Public Airwaves Coalition (“PIPAC”),²⁷⁹ made the same request following the release of the report produced by INC as a follow-up to the working group’s recommendations.²⁸⁰ In a letter to Chairman Julius Gena-

²⁷³ Drew Simshaw, Note, *Survival of the Standard: Today’s Public Interest Requirement in Television Broadcasting and the Return to Regulation*, 64 FED. COMM. L.J. 401, 413-415 (2011). However, the requirement was vacated in 2011. *In re* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children’s Television Programming Report (FCC Form 398), *Order on Reconsideration and Further Notice of Proposed Rulemaking*, 26 F.C.C.R. 15, 788, ¶ 1 (Oct. 27, 2011) (vacating *In re* Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *Report and Order*, 23 F.C.C.R. 1274 (Nov. 27, 2007)).

²⁷⁴ *In re* Standardized Program Reporting Requirements for Broadcast Licensees, *Notice of Inquiry*, 26 F.C.C.R. 16,525, ¶ 5 (Nov. 10, 2011).

²⁷⁵ *Id.* ¶ 4.

²⁷⁶ *Id.* ¶ 6.

²⁷⁷ *Id.* ¶¶ 6, 11.

²⁷⁸ *Id.* ¶ 6.

²⁷⁹ The Coalition includes the Benton Foundation, Campaign Legal Center, Common Cause, Free Press, Media Access Project, New America Foundation, and the Office of Communication, Inc. of the United Church of Christ. See *Public Interest Public Airwaves Coalition Opposition to Stay of FCC Disclosure Rules*, FREEPRESS (July 20, 2012), <http://commcns.org/WiV4ma>.

²⁸⁰ *In re* Standardized and Enhanced Disclosure Requirements for Television Broadcast

chowski on *Information Needs of Communities*, PIPAC claims that enhanced disclosures increases “the transparency and quality of information submitted by broadcast licensees.”²⁸¹ A database containing reported information should be made available to the public so that “[m]embers of the public and researchers alike [are] able to download the data in raw form in its entirety to compare stations or perform other analyses.”²⁸²

The recommendations of public interest advocates propose a method of monitoring the service of broadcast licensees that deviates from the traditional method, where much of the burden of monitoring local broadcasters is placed on the community of license. In an arrangement established by the Communication Act of 1934, the audience served by the trustees of the airwaves also monitors them. When members of the public believe that a licensee fails to meet its service responsibilities, they have options for recourse, such as filing a “petition to deny” that the Commission will consider at the time of license renewal.²⁸³ The FCC relies on members of the audience to police the content on the airwaves and the service of local broadcasters. Thus, the logic of the public trustee system leads to the assumption that members of the community of license will utilize a database containing information reported by local broadcasters to stay abreast of licensees’ service efforts. While not speaking directly on this arrangement, PIPAC’s comments on enhanced disclosure introduce its coalition members as another audience for disclosed information. Moreover, by noting that the purpose of the database is to provide data for comparative analysis, the coalition indicates that its members may be the primary users of

Licensee Public Interest Obligations, *Comments of the Public Interest Public Airwaves Coalition*, FCC 11-19, MM Docket No. 00-168, at 1, 16, 19, 22, 25-26 (December 22, 2011).

²⁸¹ Letter from PIPAC to Julius Genachowski, Chairman, FCC 1 (Aug. 4, 2011) (on file with *CommLaw Spectus*), available at <http://commcons.org/Va21KE>.

²⁸² *Id.* at 2.

²⁸³ Of course, licensees’ public service responsibilities, mandated by the Communications Act of 1934, opened the door for the FCC’s consideration of public feedback on license renewal decisions. Yet, it is worth noting that the practice of filing a “petition to deny” took hold following the FCC’s decision to renew the license of station WLBT in Jackson, Mississippi. Over the course of a decade, residents of Jackson, along with the Jackson chapter of the NAACP, petitioned the FCC to cease renewal of the license belonging to a local affiliate that would not air programs featuring African-Americans or any coverage of civil rights activism. The basis of their complaint was the station’s failure to address the informational needs of the community by avoiding coverage of political events. Though the FCC rejected the petition, in 1966 the Court of Appeals reversed the FCC’s decision to renew in *Office of Communication of the United Church of Christ v. FCC*, deciding that citizens should have a role in the renewal process because it is their interest that broadcasters are mandated to serve. See *Office of Comm’n of United Church of Christ v. F.C.C.*, 359 F.2d 994, 1006 (D.C. Cir. 1966). “In the aftermath of *UCC v. FCC*, citizens’ groups filed ‘petitions to deny’ the license renewal applications of existing broadcasters. The public interest groups argued that the licensees had not lived up to various aspects of their public interest obligations.” HORWITZ, *supra* note 1, at 247-48.

the system. Given it is unlikely that viewers will use public file information to perform comparative analysis, PIPAC discloses itself as the party best served by the proposed requirement.²⁸⁴ With this justification for online disclosure, PIPAC repositions the proposed requirement as part of a revised notion for overseeing localism in United States broadcasting. The online disclosure requirement alters the traditional conception of the cycle of local programming, powered by two parties—local broadcaster and local audience—and makes a place for public interest groups within this dynamic.

Effective August 2, 2012, the FCC now requires that television licensees post their public files online in a Commission-hosted database, which includes the formerly required staples, such as a biennial ownership reports, license renewal applications, and Quarterly Issues Programs lists.²⁸⁵ On one hand, these enhanced disclosures are the FCC's makeover of an old pursuit, conforming to the logic of the public trustee system instituted by the Communications Act of 1934. A pursuit of the localism initiative's enhanced disclosure is expected to improve upon this longstanding system by updating the informational materials that aid the public in the evaluation of broadcasters.²⁸⁶ As such, it is a recognizable, yet slightly revised, part of the original system.

When analyzed from this perspective, the continued relevance of a particular ideal becomes clear: the invested local audience as a predominant theme in American broadcast localism. In the United States system, the largely unquestioned presumption that an audience desires local service justifies the promotion of the localism principle. Like a democracy's "informed citizen,"²⁸⁷ this system is built on local audiences who tune in, hold awareness of their interests, and act to preserve them. Out of several possibilities for reform named during the localism proceeding, the FCC decided to pursue those that reinforced a "localism" characterized not by the content of broadcasters, but by the presence and investment of the community.²⁸⁸ Certainly, the hegemonic status of the invested community in American broadcasting and democratic government makes this a safe pursuit for the FCC. By enhancing disclosure and revising the public guide, steps taken in an effort to increase the potential for audience knowledge, the FCC followed tradition in ideology and mechanism. In addition to preserving the status quo, this conception of localism speaks to the

²⁸⁴ Letter from PIPAC to Julius Genachowski, *supra* note 281, at 2.

²⁸⁵ *In re Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398), Second Report and Order*, 27 F.C.C.R. 4535, ¶¶ 1, 12-18 (Apr. 27, 2012) (to be codified at 47 C.F.R. § 73.3526(b)).

²⁸⁶ See WALDMAN, *supra* note 270, at 7-9, 15-16, 122, 208-09.

²⁸⁷ See generally SCHUDSON, *supra* note 47.

²⁸⁸ See, e.g., LPFM Third Report and Order, *supra* note 231, ¶¶ 21-25 (reinstating local ownership restrictions for LPFM licensees).

beliefs of reform advocates who doubt the FCC's record for public interest protection. In this case, the FCC's pursuits reference the trope of an engaged and hungry local audience, which underlies opposition to consolidation.

However, if one considers the primary audience for public files to be public interest groups, the disclosure requirement can be interpreted as holding a different significance. In the current media environment defined by mergers, complex ownership arrangements, and innumerable outlets, the citizens that constitute communities of license are not prepared to be the watchdog. It is therefore up to organized and established public interest groups, composed of policy experts, lawyers, and researchers, to assume this role. In the reformist conception of United States broadcasting, the FCC must allow experts from the media reform community to interject. What's more, online disclosure provides access to information that will aid the media reform movement's broad mission of structural transformation through policy change. In the complex battle between public interest groups and the broadcast industry, "localism"—in this case, materializing in the form of enhanced disclosure—is not simply the objective, but also the weapon. As part of this scheme, the ideal of the engaged local audience is vacated and replaced by an audience of policy experts at national organizations, thus disrupting the traditional understanding of the local programming cycle. Though originally understood as a mechanism to strengthen localism, the disclosure rule is more accurately interpreted as having a multidimensional purpose.

V. CONCLUSION

A consideration of the different conceptions of localism constitutes a unique analytic position on localism policy. It is clear that, in the aftermath of the Telecommunications Act, the FCC moved to quiet critics of consolidation by pursuing actions that would arguably revive broadcast localism. Analysis that questions the FCC-promoted character of localism on a case-by-case basis yields evidence that challenges the claim that, with certain actions, the FCC either establishes or enforces a mandated standard that has existed since the beginning of regulated broadcasting. By analyzing, instead, which character of localism is promoted by a particular rule, the focus becomes the political and social value of the principle given the context into which it is introduced. Rather than viewing localism as a standard that is in need of safeguarding or rethinking, this position takes localism's mutability as a benign condition of the principle. Similarly, rather than assessing the successes and failures of a rule in meeting particular criteria, one's analytic aspirations are to identify the cultural interests that motivate the use of localism as a justification for policy and interpret the shape of the principle called upon to satisfy the wants of the

situation. Such an analytic position is concerned with recognizing the tremendously varied conceptions of the value of localism.

During the period following widespread media consolidation, the FCC confronted public discontent over the loss of locally owned and produced media.²⁸⁹ While on the surface it seems the FCC responded to complaints by instituting rules which sought to restore what members of the public perceived as lost, exploration of the forms of localism promoted by the rules elucidates specific cultural and political tensions surrounding local broadcasting. With the establishment of LPFM service, the enhanced disclosure requirement, and the release of the revised informational guide regarding what is required of licensees, the FCC appears to promote the ideal of the small, intimate, engaged, and active community.²⁹⁰ Referencing the vision of local community described in works of democratic theory, the FCC's pursuits address a particular kind of audience—one that is defined by a shared identity originating from its small place-based community, and willing to act in order to ensure they receive the information needed to develop politically and culturally. By considering the anticipated function of LPFM, enhanced disclosure, and revised guide, as well as the anticipated context they are intended to function within, it becomes clear that the Commission's post-1996 efforts in support of localism reflect a mythic notion of local community engagement. In addition to posturing as a manageable forum for participatory democracy, the FCC presents broadcasting as one remedy for the general "bigness" of media that scholars name as a highly detested outcome of the Telecommunications Act.²⁹¹

Notwithstanding, an examination of the comments regarding enhanced disclosure depicts a more complicated story in which localism is, on one hand, suggested to be the aforementioned ideal of community autonomy, and on the other, acknowledged to be a myth. This observation derives from an analytic position that recognizes localism's mutability and, therefore, prioritizes awareness of complex policy and localism goals. It is worth questioning which conception of localism motivates each rule proposals suggested in its name. Through this exercise, it is possible to disentangle rhetoric from rule and develop an approach to advancing localism that directly addresses the character of this complicated principle.

²⁸⁹ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 381-82 (3d Cir. 2004) (questioning the Commission's statutory authority to significantly relax restrictions on consolidated media); Free Press Quadrennial Review Comments, *supra* note 9, at 3.

²⁹⁰ See Braman, *supra* note 3, 277-78.

²⁹¹ See WRIGHT, *supra* note 11, at 3; see generally ROBERT MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999).